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Brief of Kirlin for Respondents

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SUPREME COURT OF THE UNITED STATES

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THE STEAMSHIP ELFRIDA
PYMAN, BELL & CO. Claimants, Appellants

against

CHARLES CLARKE AND ROBERT P. CLARKE
Libelants, Appellees

BRIEF FOR ELFRIDA, OPPOSING PETITION FOR WRIT OF CERTIORARI

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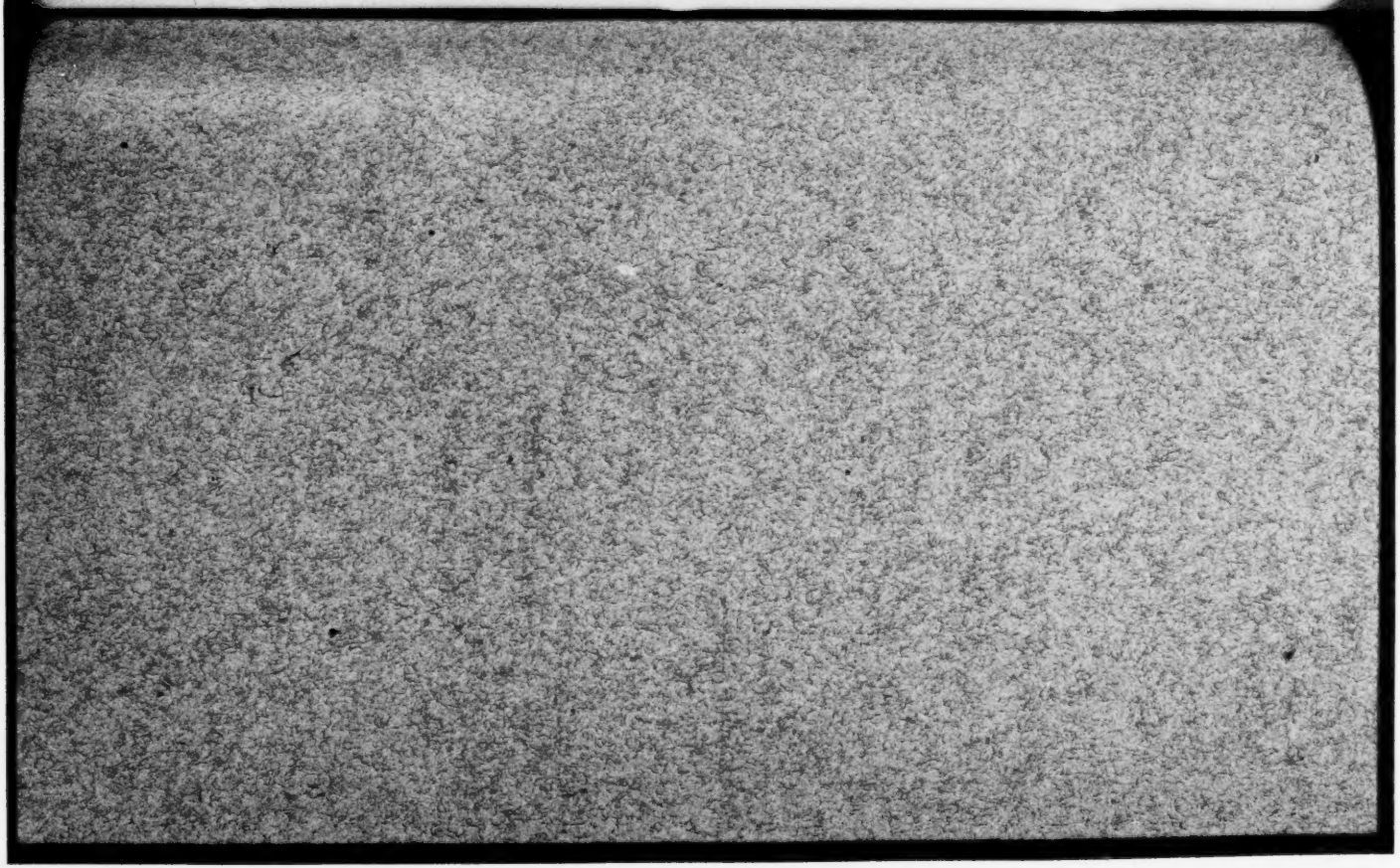

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United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

The Steamship "ELFRIDA," PYMAN, BELL & CO., Claimants, Appellants, AGAINST CHARLES CLARKE and ROBERT P. CLARKE, Libelants, Appellees.	No. 458.

Statement.

This is an appeal from a final decree of the District Court for the Eastern District of Texas, entered in favor of the libelants, October 29, 1895, awarding them the sum of $22,000, with interest and costs, for salvage services, found to have been performed for the steamship *Elfrida*, and her owners, under a contract with the master (pp. 327, 328).

The cause went to trial upon the libel filed October 24, 1894 (p. 9), the amended and supplemental libel, filed October 21, 1895 (p. 18), and upon the amended answer to the amended and supplemental libel, filed October 23, 1895 (p. 31).

In both the libel and the amended libel, the libelants rested entirely upon their contract, but in the amended libel they set forth the facts more fully and prayed "for such other, further and general relief, as in law and justice they may be entitled to receive."

The answer of the owners of the vessel, Pyman, Bell & Co., alleged in substance:

(1.) That the contract had been obtained from the master under circumstances which would justify a court of admiralty in setting it aside and awarding a salvage compensation upon the basis of *quantum meruit.*

(2.) That their cable authority to the master had been given upon partial information of the vessel's situation and peril, and furthermore, had been given with the qualification that he should only accept a tender made "if lower impossible," which instruction the master had been prevented from carrying out by information of the cable being conveyed to the salvors before the master saw them.

(3.) That the master's agreement was signed under mutual mistake of fact, or was obtained from the master by mistake on his part, which the libelants wrongfully took advantage of.

(4.) That it was improvidently made for a highly exorbitant and excessive compensation, without a proper or true understanding or appreciation of the situation, and the vessel's comparative freedom from danger.

(5.) That in making the contract, the parties were not acting upon a footing of equality, but that the libelants took undue advantage of the stress of the master's situation and the position of his vessel, and acted collusively with other salvors in obtaining from the master an excessive agreement for $22,000.

(6.) They further alleged that the libelants had not removed the steamship from the beach by the means they had agreed by the contract to use, but that, on the contrary, they received and used in addition to the means therein provided to be used by them, two of the steamer's anchors and cables, four of her winches and her windlass, and that accordingly, as strict performance of the contract had not been shown, the sum provided for in the

agreement should not have been awarded, but only salvage compensation on the basis of *quantum meruit*.

The facts and circumstances out of which the controversy arises are briefly the following:

On the 5th of October, 1895, the steamship *Elfrida*, a British vessel of 1454 tons net register, 290 feet long, 38 feet in breadth and 20 feet 1 inch in depth (fol. 562) was inward bound in ballast for the port of Velasco, Texas, in charge of a licensed pilot (fol. 320). Velasco is a few miles up the Brazos river.

To prevent the formation of a bar at the mouth of the Brazos, the United States Government has built jetties extending from the right and left banks of the river, a good distance out into the Gulf, estimated at about a mile (fols. 321, 435), the outer end of the jetties, for a distance of about 2,000 feet, being submerged (fols. 321, 435).

Whilst coming up the channel between the jetties in the afternoon of October 5th (fol. 322), the sea at the time being moderate, and there being but 5 inches between the bottom of the vessel and the bar (fol. 349), her heel touched, and an easterly wind swung her bow around against the submerged part of the west jetty (fols. 870, 910). A kedge anchor was put out from the bow to the eastward to haul her head away from the jetty, but the result of the operation was that in hauling the bow around, the stern moved and she then swung broadside to the jetty (pp. 314, 315). She lay substantially in this position until Saturday night, October 6 (fols. 322, 323), unsuccessful efforts being made in the meantime with the propeller and with kedge anchor to get her off (p. 108), when the sea having risen (fol. 326), she was carried over the submerged jetty (fol. 324) and a good distance shoreward on to the beach (fol. 326) about a cable's length to the westward of the west jetty (fol. 904), with her stern inside that part of the jetty which was above high water (fol. 430), which accordingly sheltered her from easterly winds (fols. 295, 343). She lay substantially parallel with the jetty (fol. 436), about 400 or 500 feet from the beach, head on (fols. 441, 764), and about 1,000

feet from water of sufficient depth to float her (fol. 764, amended libel, fol. 54).

The shore at this point is very flat (fols. 369, 382). Her draught at the time she went over the jetty was 11 feet 6 inches aft (fol. 804), and about 9 feet forward (fol. 912). The water, all the time while she lay there, at high tide, was about 8 or 9 feet, depending on the tide, which was irregular (fols. 871, 805, 718). It is admitted in the libel that she was in 9 feet of water at high tide (fol. 54).

The sand is quick at that point for about 10 feet down to the blue clay which underlies it (fol. 388). As the steamer lay in it she was in motion unless it was very smooth (fol. 451). She would settle in it to her usual draft when afloat (fol. 391).

By pumping out the water ballast, the steamer's draught could be reduced 18 inches, or to 9 feet (fol. 916). This appears to be conceded in the libel (fol. 54). She had on board 140 tons of coal, which could have been removed if required (fol. 333), but which it was not found necessary to remove. It thus appears that with the ballast pumped out, the steamer must have been very slightly aground at the top of a high tide, and that if the coal had been removed, the draught would have been correspondingly further reduced.

The agents of the vessel under the charter-party which she was preparing to enter upon, at Velasco, were J. Moller & Co., of Galveston. They had an office at Velasco, which was in charge of M. P. Morrissey. As soon as the report of the stranding reached Galveston, Messrs. Moller, on October 7, advised Morrissey by telegraph, as follows:

"Clark's tug, with hawser, gone *Elfrida's* assistance. Recommend Charles Clarke solely attend matter, he being very practical wrecker" (Ex. 10, fol. 715).

Morrissey admits having told Captain Burgess, of the *Elfrida*, that Mr. Moller recommended that Charles Clarke have sole charge of the matter (fols. 237, 239), and he telegraphed back to Moller & Co. at 4.56 P. M. of the same day, "Think *Elfrida* will accept Clarke" (Ex. 15, fol. 718).

There were but two firms at Galveston, with proper and sufficient plant to conduct the salvage operation on a vessel lying upon the beach. These were Charles Clarke & Co. and Fred A. Brock (fols. 512, 527, 490, 918, 924). Both had tugboats (fols. 187, 188). Clarke had heavy anchors necessary to be used in pulling a vessel off, but no lighters from or by which the anchors could be planted (fol. 161), whilst Brock, on the other hand, had lighters but no anchors (fol. 470). It was, therefore, necessary for the success of the operation that both should work upon it or the property of both be engaged in it, as the event subsequently showed (fols. 161, 548, 919).

Clarke started for Velasco October 7th (fol. 181) and appears to have entered into negotiations with Captain Burgess immediately (pp. 48, 49). Brock was already at Velasco, and had been working on the vessel with a small anchor and his tugboat previously. Finding Clarke upon the inside track, Brock, on the morning of the 8th, telegraphed Moller & Co., saying:

"I have been on ground and rendered assistance to *Elfrida*, running anchors, &c.; why shut me out altogether? Am able to furnish plant" (Ex. 18, fol. 719).

To W. F. Beers & Co., of Galveston, he wired on the same morning:

"If you are Lloyd's agent, why not let me work on *Elfrida*, as well as any other person? I was on ground and ran anchors out before *Seminole* (Clarke's tug) came" (Ex. 19, fol. 720).

To James Sorley, Lloyd's agent at Galveston, he telegraphed on the same afternoon:

"I have already rendered assistance to steamship *Elfrida*. Before you close with others, give me a chance" (Ex. 20, fol. 720).

Brock's efforts to interfere with Clarke's negotiations were stopped by the following answer from Moller, which Morrissey received from Galveston on the 8th:

"Inform Brock *privately*, as master of *Elfrida* called for assistance, we could not help sending Clarke, who had

only tugboat available. We have no objection to Brock continuing assisting *Elfrida*, making his own bargain, so long as *Whitejacket* attended to."

Morrissey admits that Brock had some conversation with him to the effect "that he did not want to be shut out" (fol. 242), and that after he received the message from Moller, above quoted, he showed it to Brock (fol. 244).

So far as the evidence shows, and it is very voluminous, Brock made no further efforts of any kind to be employed in the salvage service in competition with Clarke after putting in a larger bid than Clarke's on the 9th, although he was asked to underbid Clarke subsequently (fol. 796).

Brock died before the case came on for trial (fol. 244).

The master had been cabling to his owners, Pyman, Bell & Co., of Newcastle-upon-Tyne, England, almost daily, giving them partial information of the situation of the vessel and communicating certain fears on his part as to sand banking around her, which he says was done upon representations made to him by Clarke (fols. 797, 798). These cables will be considered more fully hereafter.

On October 9th, the master, upon the advice of Morrissey and of James McSorley, Lloyd's agent at Galveston, who was very aged, ill and infirm at this time (fols. 251, 422, 428), concluded to take tenders for the removal of the vessel from the beach (fol. 932). As was expected, only two tenders were received—one from Brock for $24,000, and one from Clarke for $22,000 (fols. 795, 796).

In a cable dated October 9th the master acquainted his owners with these tenders, recommending acceptance (fol. 840). To this he received in reply a cable from his owners on October 10th, as follows:

"Don't act without our instructions, Lloyd's underwriters communicating direct as consider tender excessive, try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges" (Ex. 27, fol. 724).

This answer was apparently communicated by the master to Clarke, who was still in Velasco (fol. 150).

Thereupon, and on the 11th, the master sent two further cables to Newcastle as follows, based, as he says, on Clarke's representations (fols. 797, 798).

In the forenoon (Ex. D):

"Delay will cause danger of sand banking, also increase cost of floating."

And in the afternoon (Ex. E):

"Fresh breeze blowing, vessel laying easy, making no water, afraid of sand banking up (fols. 841, 842)."

In explanation of those cables, the Captain says (fol. 797):

"Well, I sent this cable (Exhibit D) when Mr. Clarke said that if I did not receive word soon, he would want more for floating the ship, as there was a bank forming around her, and I cabled my owners to that effect."

The last one (Exhibit E) was sent upon similar representation (fol. 798).

The representation of sand banking up was entirely unfounded:

"Q. Now, captain, what was the actual fact as to this banking of sand around the steamer, at the time she was floated (October 17th, 6 days later)? A. It was hardly perceptible" (fol. 799).

"Q. Could you have told while on the vessel, by sounding or otherwise, whether the sand was forming around her? A. Yes (fol. 813).

"Q. Did you examine to see whether it was forming while she was lying there? A. Yes, sir.

"Q. What did you discover? A. I found the sand was not making any at all, or very little" (fol. 814).

The pilot says the only place it banked at all while she was ashore was in the eddy under her bow (fol. 338).

Acting upon the two cables of October 11th, which the owners supposed were based upon some visible indications of the danger suggested, they authorized the captain, in a cable dated October 12th, as follows (Exhibit 19, fol. 623):

"Accept tender 4,580, if lower impossible. No cure no pay. Try include in agreement, if steamer after coming

off not worth amount of salvage, steamer in damaged state to be taken in payment salvage."

This cable was received by the master at Velasco, in the afternoon of the 12th (fol. 203).

The telegraph office at Velasco is in the same building with that of Morrissey, and the captain states that when Morrissey handed him the sealed cable, he stated he had already wired Galveston that Clarke's offer was accepted (fols. 788, 790, 791, 804).

This was, however, disputed by Morrissey, but the record shows that on the 12th he telegraphed Moller as follows:

"Pyman cables accept Clarke's bid. Tell him better get here quickly" (fol. 685).

According to the telegraph record at Velasco, and the evidence of the telegraph operator, Clarke had learned of the master's cable or its purport before the master received it. The operator at Velasco, Vaughn, testifies as follows:

"Yes, I received telegram at 8 A. M. on October 12, 1894, from Charles Clarke & Co., Galveston, addressed to Captain B. Burgess, steamship *Elfrida*, Velasco, Texas, of which the following is a copy:

"'Galveston, Tex. 12th. B. Burgess, S/S *Elfrida*, Velasco. Contract price agreed upon. Get things ready to start. Charles Clarke & Co.'" (fol. 688).

At the trial, libelants called Vaughn, and attempted to show by him that 8 *A.* M. October 12th was an error for 8 *P.* M., and having been told that the master's cable was not received by him until the afternoon of the 12th, and being ignorant that communication might have been made through Lloyds' agent at Galveston or otherwise, he feebly admitted that it might be a mistake (fol. 463).

Under very leading direct-examination, he testified:

"Q. From the facts, I understand you to say with regard to these dispatches, that it was not likely it was received at 8 A. M.? A. I do not know. My records show the time of receipt and delivery" (fol. 463).

On his CROSS-EXAMINATION:

"Q. Did you not tell Judge Lockhart that you had no independent recollection? A. Nor have I.

"Q. Did you not tell him when you testified before [under commission], that you had your record slip before you? A. Yes, sir.

"Q. Was that a fact? A. Yes, sir; and I have lost it since.

"Q. You have been subpœnead by Judge Lockhart to produce that? A. Yes, sir: but could not do so, because I lost it.

"Q. You testified then with your record before you? A Yes, sir."

It thus appears that by his record, he had received the message at 8 A. M. on the 12th.

Libelants then called the telegraph manager, who stated that the original telegram had been destroyed, and produced what he claimed was a copy; but he testified (fols. 552, 553) that in comparing the copy, which he had made, and before the destruction of the original, his mind had not been directed to the question whether the hour was 8.25 A. M. or 8.25 P. M., and he did not compare it with the view of determining absolutely which was correct (fols. 552, 553).

Whether Clarke learned as early as 8 A. M. of the 12th of the master's qualified authority or not, the material fact is that he admits he learned from Moller, through Morrissey's telegram, or through Sorley, before he saw the captain again, that his bid was accepted (fol. 152); therefore, when he reached Velasco on the 14th, and the master attempted to carry out his instructions to try to obtain a lower offer, both Brock and Clarke knew the substance of his cable (fol. 799), and not only refused to take less but threatened to require more unless their offer was immediately accepted. The master says:

"They (Clarke and Clarke) told me that if the agreement was not settled, they would have to give it up. If we did not come to terms they would have to give it up.

"Q. What terms? A. This $22,000.

"Q. Did he give you any reason, or state why he had to give it up? A. He said that a bank might form around

the ship, and it would cost more to float her, and the risk would be greater.

"Q. Who told you this? A. Mr. Clarke.

"Q. Did you endeavor to solicit other people after receiving this cablegram that I quoted above? A. I saw Mr. Brock; that was the other party that attended.

"Q. What did he say about doing the work for a lesser price than $22,000? A. He would not do it." (fols. 795, 796). "Mr. Clarke said that if I did not receive word soon he would want more for floating the ship * * *" (fol. 797).

Morrissey and Sorley advised the master to accept Clarke's offer, and advised him against applying at New Orleans on the ground that it would cost more to obtain salvors there (fol. 802). The master thereupon, and on October 14th, accepted Clarke's tender—$22,000.

The contract was drawn up by Clarke and delivered to Mr. Sorley in Galveston (fol. 158). Mr. Sorley sent it over to Morrissey, who had it rewritten, without change, except the introduction of a clause limiting the time to 21 days (fols 215, 216, 268, 269).

The agreement thus made and signed on the 15th was as follows (p. 47):

"STATE OF TEXAS, }
County of Brazoria. }

THIS AGREEMENT, made and entered into this 15 day of October, 1894, between the Steamship *Elfrida* and the owners thereof, represented herein by B. Burgess, Master of said Steamship, as party of the first part, and Charles Clarke & Company, of Galveston, Texas, party of the second part.

Witnesseth, that for and in consideration of the covenants and agreements herein contained on the part of the said party of the first part to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, the said Steamship *Elfrida*, which is now stranded west of, and near to, the west jetty, at the mouth of the Brazos River, in said County and State, and furnish all labor and material, at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said Steamship, and to complete the same within twenty-one days from date hereof.

Said party of the first part agrees to pay said party of the second part, for such service, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dollars ($22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said party of the second part, in lieu of the said twenty-two thousand dollars, agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto, that should he fail to float and place in a position of safety, as above stated, said steamship, within the time hereinbefore specified, to wit, 21 days from date hereof, that said party of the second part shall receive no compensation whatever from said first party, for work performed, labor, tools or appliances furnished.

Anything that may be discharged to enable the vessel to float shall be replaced when she is in a position of safety.

It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship *Elfrida*, for himself, said ship, and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this fifteenth day of October, 1894.

BENJ. BURGESS.
CHARLES CLARKE & CO.

Witness,
M. P. MORRISSEY,
J. H. DURKIE,
Master S/S *Lizzie of Whitby.*"

During the 13th and 14th, after he had learned through Moller that the master was authorized to accept his tender or that it was accepted, as Morrissey's telegram said (fol. 152), Clarke hired a small 45-foot schooner, of 15 tons burden (fol. 476), upon which he loaded some anchors, cables and provisions (fols. 473, 474). These he took to Velasco, in tow of the tug *Josephine*, on the 14th (fol. 187).

The schooner was hired simply to take the anchors, cables and provisions to Velasco, and was to receive $100 (fol. 476).

The contract appears to have been signed on the afternoon of the 15th, after the arrival of the expedition at Velasco (fol. 159).

A barge or lighter was required to plant the anchors, and these at Velasco appear to have been controlled by Brock.

On the subject of collusion between Brock and Clarke, Clarke testified upon his cross-examination:

"Q. When did you hire the lighter from Brock? A. It was the day I arrived there, the 14th, I think, *before the contract was signed*" (fol. 161).

Realizing the force and effect of this answer, he subsequently modified the statement by saying that he only asked him (Brock) "If I could get a lighter"; and later on he denied absolutely having seen Brock at all before the contract was signed (fol. 161). He admits having need of the lighter, and having arranged with Brock, and the cessation of the efforts to obtain the job, after Clarke appeared in Velasco, when viewed in contrast with his earlier telegrams begging to be "let in," and protesting against being shut out, tend to corroborate Clarke's first and significant statement, made before he appreciated the real effect, that he "saw Brock about the barge" before the contract was signed. It also appeared pretty clearly that Brock was interested in the contract (Ex. 52, fols. 736, 548, 821, 919).

On the 16th the anchors having been put upon Brock's barge, were planted, two of them together on the port quarter and two on the starboard quarter, about 1,540 feet astern of the vessel (p. 62). Two of the heavy anchors thus planted belonged to the *Elfrida*, and Clarke's rope cables were attached to the end of the steamer's anchor chain cables (p. 56).

The rope cables were then brought aboard the steamer and attached to her steam winches, which were located on deck. Two winches were attached to each rope, by first passing the rope around the drum of one and then forward around the drum of the second; thus four winches were brought to bear on the two heavy cables that went out to the anchors astern; a rope from the anchor on the starboard side was carried to the steamer's windlass, situated forward (pp. 56, 57, 110, 291). The tanks were then

pumped out, so as to lighten the steamer's draught (fols. 330, 331). All these arrangements were perfected during the 16th and on the 17th, up to 3 o'clock (fol. 900). Steam having previously been ordered both for the main engine, which operates the propeller, and for the steam winches, which are small hoisting engines situated on deck, the steamer began to haul herself off the beach under her own steam alone. No tugboat was attached to her (fols. 900, 170, 171, 172, 873, 875, 881, 895). She started almost immediately after the strain was put upon the rope, and went along with slight jerks and bumps until she was afloat (fols. 907, 901, 874), when, owing to the failure to place any anchor on her port side, the current which set towards the eastward, struck her port side and floated her over again on the submerged jetty; it took an hour or two to get her off the jetty (fol. 174) and she was finally floated in clear water and went off to sea under her own steam at 7.30 P. M. (fols. 950, 960), in about four hours from the time of starting to pull.

The pilot stood off to sea that night and brought her into Quintana, which is just at the mouth of the river, and about three miles below Velasco, on the following day, October 18th.

During the whole time that she lay on the beach the weather was fair and moderate and the sea smooth, except one day, October 15th (pp. 78, 114, 326, fols. 902, 905, 910, 928, 930, 936, 871, 872, 874, 875, 880, 881).

The vessel's position did not change at all from the time she was swept over the submerged jetty on to the beach on the night of October 6th until the salvors began to haul on her with the cables attached to the anchors on October 17th (fols. 326, 327).

Having been ordered to Newport News for dry-docking, to ascertain whether she had suffered any damage, it was found that no damage of any sort had happened to her, except on one plate on the turn of the bilge, and for the space of about a foot each way; the plate was dented in to the depth of about half an inch. This had probably been done by striking a rock on the jetty at the time she was borne over it (fol. 803).

Upon learning of the promptitude with which the vessel was removed from the beach, the owners of the vessel became suspicious that her actual situation had not been truthfully and fully presented to them, and on receiving a letter from the master dated October 7th, a day or two after the steamer was removed, their suspicions were further confirmed (p. 197).

They thereupon disaffirmed the contract (fol. 593), and offered in their pleading to submit to a decree for such salvage compensation as the Court might award (fol. 89).

The salvors refused this offer, and stood upon their contract, and the cause went to trial upon the issue whether recovery should be awarded upon the contract, and for the amount therein stated, or whether it should be based upon *quantum meruit*.

The District Judge, in the decree, found:

(1.) That the services were rendered by the libelants under a contract in writing made between them and Benjamin Burgess, master of the steamer.

(2.) That the master was duly authorized to make the contract.

(3.) That it was a lawful contract entered into by the master, with full knowledge or the means of knowledge of the master and of the owners of the steamship, of all the conditions then existing.

(4.) That the amount named in said contract was not unreasonable under the said conditions (fols. 981, 982).

Thereupon, the claimants appealed to this Court and assigned error, as follows (pp. 330, 333):

First.—For that the said Court found that the alleged contract for salvage was freely and voluntarily made, and was binding upon the *Elfrida*, and awarded judgment thereon for the full amount thereof.

Second.—For that the Court found that the master of the *Elfrida* was duly authorized to make the said alleged contract.

THIRD.—For that the Court found that said alleged contract was a lawful contract.

FOURTH.—For that the Court found that said alleged contract was entered into by the master of said steamship with full knowledge or means of knowledge of the said master, and of the owners of said steamship, of all the conditions then existing.

FIFTH.—For that the Court found that the amount of $22,000 named in said alleged contract as the price for the services to be performed was not unreasonable under the conditions existing when the same was entered into.

SIXTH.—For that the Court refused and omitted to find that the said alleged contract was signed by the captain under practical or constructive compulsion and duress, and was therefore not binding upon the property of the claimants.

SEVENTH.—For that the Court refused and omitted to find that the said alleged contract was signed by the master improvidently for an excessive and exorbitant compensation, and was therefore not binding upon the claimants' property.

EIGHTH.—For that the Court refused and omitted to find that the said alleged contract was obtained from the master through collusion between the libelants and the only other bidder for the work of salving the vessel, and that both of said salvors co-operated in performing the services and were interested in the reward.

NINTH.—For that the Court refused and omitted to find that libelants took advantage of the distress of the vessel's situation and of the apparent or real need of present assistance, and of the absence of other salvors, or means of salvage, to obtain a contract from the master for an excessive and exorbitant compensation; and that accordingly the said contract was not obtained in good conscience, and ought to be avoided and set aside, and salvage compensation given on the basis of *quantum meruit*.

TENTH.—For that the Court refused and omitted to find that the master was wrongfully induced to sign the said contract for an excessive compensation, by erroneous representations as to the probable future danger of the vessel from storm and shifting of sand, made by the libelants, or by others in their interest or behalf, upon whom the master was justified in relying for advice. That said contract was not his free and voluntary act, or that of the owners of the vessel, and should be disregarded and

suitable compensation awarded for the services performed.

ELEVENTH.—For that the Court refused and omitted to find that said alleged contract was made upon mutual mistake of fact as to the seriousness of the vessel's condition, and the difficulty of moving her from the strand, and for this reason should be vacated and set aside.

TWELFTH.—For that the Court refused and omitted to find that the qualified authority given to the master by the owners of the vessel was given upon imperfect and erroneous information furnished to them by the master, and without a true appreciation of the real situation or position of the vessel, and from want of information, and should not bind them or their vessel to the said contract, and that as soon as they learned the real situation they disaffirmed the contract, and offered to consent to a decree for suitable salvage compensation for the service actually performed.

THIRTEENTH.—For that the Court refused and omitted to find that the master failed to follow the instructions and authority of the owners to accept the sum of £4,580 sterling, only in case a lower amount was unobtainable, but, on the contrary, agreed to a contract in the said sum, without making any further or other efforts to obtain bids for a lower figure, and that, therefore, said contract was not made with the owners' authority.

FOURTEENTH.—For that upon all the facts and circumstances of the case, the Court omitted and refused to find that the alleged contract was for an exorbitant and excessive compensation, and ought to be set aside and disregarded, and an award made in such sum as the Court might find to be a suitable and reasonable compensation, as and for a salvage service performed independently of contract.

FIFTEENTH.—For that the Court refused and omitted to find that in any event strict performance of the contract had not been made by the libelants, in that they had not removed the vessel from her stranded position by means of their appliances and apparatus alone, and with the aid of the steamer's engine and crew, as provided in the contract, but that, on the contrary, the salvors obtained and made use of further apparatus and appliances belonging to the ship, to which they were not by the contract entitled, namely, four of the steamer's winches and her capstan, and two of the steamer's anchors, with their chain cables.

SIXTEENTH.—For that the Court awarded a final decree against the libelants, for the sum of $20,000, upon said alleged contract, with interest and costs.

SEVENTEENTH.—For that the Court refused and omitted to enter a decree in favor of the libelants for salvage compensation on the basis of a *quantum meruit* only.

POINTS.

I.

Of the nature and extent of the service performed and of the award which would be made for it by a court of admiralty, irrespective of contract.

As a means of determining whether the contract made was for an exorbitant and unreasonable compensation or was improvidently made, it is fair to examine the work done, by the standards usually adopted in determining the value of a salvage service, and to consider the amount for which an award would probably have been given apart from any contract. If it appears that the contract was for an amount very much in excess of what a court of admiralty would allow in the absence of a contract, good ground will be shown for setting the contract aside as unreasonable and inequitable.

In *Cope* v. *Valette Dry Dock Co.*, 119 U. S., 625, the Court stated the ingredients of a salvage service that affect the award as follows:

"1. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects.

"2. The degree of danger and distress from which the property is rescued; whether it were in imminent peril and almost certain to be lost if not at the time rescued and preserved.

"3. The degree of labor and skill which the salvors incur and display and the time occupied.

"4. Lastly, the value."

Remarking upon these ingredients, the Court said:

"Where all these circumstances concur, a large and liberal award ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated as salvage service; it is little more than a remuneration *pro opere et labore.*"

It is to be observed that in this classification of the ingredients of a salvage service, the Court places the risk and enterprise of the salvors in the performance of the service first; the value of the salved property last.

According to Lord STOWELL, personal risk in the performance of the salvage service is the element which confers the best title to an ample award:

"What enhances the pretensions of salvors most is the actual danger which they have incurred; the value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this is shown to have been hazarded, it is most highly estimated."

The *William Beckford*, 3 Christopher Robinson, 355, 356.

Sir JOHN NICHOLL also took the same view.

The *Clifton*, 3 Haggard, 117, 121.

The most recent expression of judicial opinion in England in this matter was announced by Lord Justice LINDLEY, in the Court of Appeal, as follows:

"The first matter of consideration is the nature of the service rendered, the dangers from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to the rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. The next matter for consideration is the value of the property saved."

The *City of Chester*, 9 Probate Division, 182, 202.

In the most recent work on this subject—that of Sir WILLIAM R. KENNEDY, one of the Judges of the Queen's Bench Division, on *The Law of Civil Salvage*, a subdivision of these main heads more convenient for discussion is suggested, with the following comments:

"Some circumstances are always material for consideration, and these have been ascertained by experience, and the Court has for its guidance a long course of judicial decisions to assist it in coming to a proper conclusion in each particular case. These material circumstances which Dr. *Lushington*, in his judgment in the *Charlotte*, 3 Wm. Robinson, 68, 71, calls 'the many and divers ingredients of the salvage service,' it is necessary now to consider in detail. These may be classified as follows:

(*A.*) *As regards the thing salved.*

1. The degree of danger to human life.
2. The degree of danger to property.
3. The value of the property salved.

(*B.*) *As regards the salvor.*

4. The degree of danger to human life.
5. Their skill and conduct.
6. The value of the property employed in the salvage service.
7. The danger to which the property is exposed.
8. The time and labor expended in the performance of the salvage service.
9. Responsibilities incurred in the performance of the salvage service such, *e. g.*, as risk to the insurance and liability to passengers or freighters through deviation or delay.
10. A loss or expense incurred in the performance of the salvage service, such, *e. g.*, as detention, loss of profitable trade, or repair of damage caused to ships, boats or gear."

Upon this subdivision Mr. Justice KENNEDY makes an observation similar to that made in the Supreme Court in the case of *Cope* v. *Dry Dock* (*supra*), as follows:

"Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or where they are present only in a low degree, the salvage remuneration awarded is comparatively small."

Kennedy, Civil Salvage, 119.

How many of these elements exist in the present case, and do those which are found exist in a high or low degree? The answer to this inquiry will suggest the amount which would be awarded apart from contract.

A. As regards the "Elfrida."

1. *The degree of danger to human life.*

It is nowhere suggested in the allegations or proofs that the lives of those on board the steamer were in any jeopardy by the accident or during the subsequent time that the vessel lay on the beach. The proofs expressly negative any such contention. The weather was fine during the whole of the time (p. 326), and there was communication with the shore by the vessel's small boat (fol. 906). The absence of such risk shows at the outset of the inquiry that the service is wanting in that element which has always afforded the most conspicuous argument for a liberal reward.

"However great may be the danger to the property itself, if it is wholly unattended with the risk to human life, it assumes much less value than when under circumstances where human life is put in peril."

Dr. LUSHINGTON in the *Thomas Fielden*, 32 Law Journal, Admiralty, 61, 62.

The *Bartley*, Swabey, 198, 199.

2. *The degree of danger to the Elfrida.*

This is the point of most importance in the case. It naturally divides itself into two subdivisions: (*a*) actual present danger; (*b*) dangers reasonably to be apprehended in the future.

(**a.**) *The steamer's actual present danger.*

It fairly appears from the libelants' evidence that the steamship was not and had not been in any actual danger of physical injury at any time after she stranded up to the time she was floated. She was directly head on to the

shore (fols. 441, 764, 915, p. 322), parallel with and about 300 feet from the west jetty (fol. 436). She was upright (fol. 330), and had made a bed for herself in the quicksand, in which she rested, moving with the agitation of the water (fols. 327, 451, 311), on the same draught at which she would have lain afloat (fols. 390, 391, 327). She lay about 2 feet in the sand at ordinary high water (fol. 935). She could have reduced her draught 18 inches or to about 9 feet by pumping out the water ballast (fols. 54, 916).

The tide, as appears from the blue print of the tide record produced by Lieut. Judson of the United States Engineers' Office at Galveston, page 153, was very irregular. This is taken at Galveston, but it would be substantially the same at Velasco (fol. 460). The mean low tide on the blue print is represented by the longitudinal white line. From the time the steamer stranded until she was removed, on the 17th, the high tide varied from about 2 feet 9 up to 3 feet 3, and down to 2 feet. The steamer did not, therefore, always have the same amount of water under her her at high tide, and this may account for the different depths of water stated by different witnesses. The steamer's witnesses showed that the vessel was lying in about 9 feet of water at the top of high tide (fols. 718, 805, 871), and this is expressly admitted in the amended libel (fol. 54).

It is proper at this place to point out that the claim made by some of the witnesses that the dispatch with which the vessel came off was accounted for by extreme high tide, is not borne out by the record. While the tide was higher on the 17th than it was on some of the other days of the month, it was not so high as it was on the 9th, 10th, 14th and 15th, nor higher than it was on the 15th, 16th, 18th and 19th. It was much higher later in the month (see blue print).

The depth to which the steamer was imbedded in the sand must have varied with the different stages and heights of the tide. The chief engineer, Dove, whose opinion on this point should be valuable, says: "We weren't bedded much in the sand" (fol. 897).

On the 9th, when there was a very high tide (see blue print) at noon, Morrisey, at 12.10 A. M., telegraphed

Moller & Co. that the *Elfrida* was "*swinging freely on high tides, showing no bed*" (fol. 722).

The ease and rapidity with which the vessel came off on the 17th, when the tide was about four or five inches lower than on the 9th, shows that the vessel could not have been very hard aground.

Her position on the beach was such that the sea affected her very little.

The testimony of libelant's witness, Hutchings, who has been Superintendent of the Life Saving Station of the Gulf of Mexico for 13 years, shows that the shore along the Velasco is very flat, sloping out gradually (fols. 369, 381). A depth of 9 feet of water would not be reached inside of 1,200 feet from the shore (fol. 382). To reach a depth of 14 or 15 feet, one would have to go out three-quarters of a mile (fol 382).

The worst break of the waves, he says, is in 12 or 16 feet of water, and only the spent force of the waves rolls from that point in upon the beach (fols. 382, 383).

As the steamship was lying in about 9 feet of water at her stern at high tide, it follows that she was well inside the point where the greatest force of the waves would be broken.

The testimony of Hutchings was confirmed by what actually occurred.

The master says there was no sea in and about where the ship lay (fol. 916).

By the log it appears that the steamer drifted over the breakwater about 8 P. M. of the 6th, with a considerable sea on, and that at 2 A. M on the 7th she drifted further on the beach (fols. 944, 946). From that day until the day she was removed from the beach, she lay in the same place without changing her position (Coveney, fols. 326, 327).

According to the log, there was only one occasion on which the ship bumped at all, whilst lying on the beach. On that day, October 10th, the log reports strong southerly gale and high sea, ship straining and bumping heavily (fol. 947).

On the 14th and 15th, the log reports very strong southeast gale, but the ship "lies fast on the ground," on both

days, and there is no report of any bumping (fol. 949). Bumping on the 10th is probably accounted for by the fact that with a southerly gale the incoming waves would strike the vessel slantingly on the port side, while, with a southeast gale, the waves would be directly astern, as she was lying about southeast and northwest.

Apart from these three days, the log reports fine weather, and the evidence of the captain is to the effect that the report of the weather in the log on the 14th and 15th is exaggerated (fols. 928, 929).

The master and the other witnesses for the steamer state that the weather was fine during the whole time that the vessel was on the beach (fols. 902, 905, 910, 927, 998, 871, 872, 874, 875, 880, 881, 930 and 936).

The testimony of the witnesses is corroborated by the official weather report (p. 326), from which it appears that the wind was blowing off shore during the time the vessel was on the beach, except on the afternoon of the 9th, and on the 10th, 11th, 12th, 15th, 16th and 17th. The maximum velocity of the wind, while the vessel was on the beach, was 28 miles on the 8th, but as this was from the north, it was off shore and would not affect her. On the days when the wind was blowing on shore, the 10th, 11th, 12th, 14th, 15th, 16th and 17th, the maximum velocity per hour was 14 miles, and from that down to 3 miles. It also appears from the same report that the weather was clear during the whole time.

The actual position of the vessel was not a dangerous one (915). Sand was not banking around her (fols. 799, 813, 814, 820, 338). It was a position from which she was easily and promptly removed. None of the libelants' witnesses pretend that her position was one of actual danger. The danger they spoke of lay in the future. It was potential and was based on the hypothesis of gales between the southeast and southwest.

J. Edmunds, 1 Summer 207

(b.) *Probable future danger of the vessel.*

Here we enter the region of speculation. The libelants called a large number of witnesses more or less expert to whom counsel described the position of the vessel, with more or less accuracy, all of whom united in saying that

in certain conceivable contingencies the vessel would probably have been a total loss. All these witnesses were subjected to cross-examination as to their actual experience. The result of this was that the witnesses were unable to point to a single instance where a large iron steamship ashore anywhere on the Texas coast had become a total loss. There was some evidence that some wooden vessels, which had no steam power to aid in getting them off, and which may or may not have been laden with cargoes unfavorable to their salvation, had broken up; some small iron boats had also been lost; one vessel which had stranded broadside on the beach had remained on about two months and broken her plating so that a witness could put his hand through it. Another witness described the stranding of a steamer a good distance further to the southwestward, where sand had banked on the in-shore side of her, so that a stork stood 10 feet from her on one leg (fol. 402). But this was on a different kind of shore (fol. 408). These vessels, however, were ultimately got off.

If we distill the evidence of the pilots and friends of the libelants, as to the probable danger of the ship's loss, its essence will be equivalent to the testimony of libelants' witness Hutchings, superintendent of the life saving station, whose evidence has been previously referred to, and who was their most competent expert.

Hutchings testified that there had never been an iron steamer lost on this coast from stranding, in his 13 years' experience (fol. 384). He only mentioned one instance of an iron vessel which had been seriously damaged (fol. 405), and that was on the part of the coast where the bottom was different from that at Valasco (fol. 408).

Considering the danger of a stranded vessel, on the coast, in connection with the probabilities of her ultimate safe removal, this witness testified as follows:

Q. Has there ever been an iron steamer lost on this coast from stranding in your experience? A. No, sir.

Q. Every one has been gotten off? A. Yes, sir. One was in an awkward position for ten or eleven days, and it was doubtful whether it would be gotten off or not.

Q. Has it not been the experience of persons knowing about matters of this kind that it is within a reasonable

certainty that a vessel stranded on a coast like this can be hauled off by means of anchors in the ordinary weather which prevails here? A. Yes, sir. I do not see why an ordinary vessel could not be hauled off with the ordinary apparatus if the weather is favorable, every-day weather,

Q. Is it not, therefore, that the preponderance of probabilities are in favor of a vessel getting off when she gets aground under ordinary circumstances along this coast? A. Yes, large vessels; small ones, no.

Q. Iron steamers in ballast? A. Yes, under ordinary circumstances.

Smith, another witness for the libelant, said: "You can almost take anything off the beach. The question is whether it is worth it. If it was up in the prairie it might be gotten off" * * * (fol. 289).

The preponderance of probabilities was always in favor of this vessel's safe removal from the beach. Her position, head on the beach, was most favorable. She was perfectly upright and at high water was lightly aground; at extremely high water she was afloat at the stern, and was moving in the water. She was able, by removal of her water ballast and coal, to lighten her draft so that she would not be aground, if at all, more than 6 inches in quicksand. She was undamaged, had the full use of her machinery and steam, and was in such a position that the jetties protected her from east winds. When the winds wore around from the east to the southward, they would not be likely to increase to gales, because when the wind works around with the sun, fair weather is portended (Coveney, fol. 341).

A season of the year had been reached when *severe* weather was not to be expected from points between the southeast and southwest. Hutchings said the October winds were generally northwest and northeast (fol. 374). Libelants put in a table compiled by the local forecast official of Galveston, from official records (p. 186), by which it appeared that for 20 years the prevailing direction of the wind in the month of October, was southeast, but with an average velocity of only 10 miles an hour; and that during the like period for the months of November and December, the prevailing direction of the wind was north

and the average hourly velocity 9 and 10 miles respectively.

Unless, therefore, it was to be assumed this October, November and December would be different from those of the preceding twenty years, the weather reasonably to be expected for the next two months was no menace to her safety, as the wind would be off shore most of the time, and when it came on shore would come with little velocity.

It has been shown by the evidence that the October in question was not an exception to the general rule. During that part of the month when the wind was from the southeast it was very moderate, and did not affect the vessel, and during all the remainder of the month, after she got off the weather is stated to have been fine (p. 326).

We think it is fair, therefore, to say that the libelants' evidence tended very strongly to exaggerate the probable future danger of the vessel. Her situation was rather one of deadlock than of danger. She was out of her element and needed assistance to get off, but with the assistance of anchors and chains there was no reasonable probability that she would not get off, and get off in safety. If she had been supplied, or could have obtained additional anchors, it was the belief of the pilot (fols. 334, 348) and of the master that she could have got herself off. The experienced libelants, who had never failed to get a vessel off (fols. 416, 410, 427, 430), were almost certain of success. The promptitude with which their efforts were crowned with success shows how easily the vessel could be removed, and how lightly she must have been stranded.

3. *The value of the property saved.*

The libelants introduced no evidence upon this subject. One of the owners, Mr. Bell, who had been manager, or part manager, of more than twenty steamers in twenty-five years, and at the time of his examination was the largest owners of shares in the eleven steamers operated by his firm, Messrs. Pyman, Bell & Co.; who had been for many years interested by ownership in about thirty

steamers under the management of other firms; who had been for many years a director of several steamship mutual associations in West Hartlepool, Whitby and London; and who had negotiated the purchase and sale of steamers for many years, states that a liberal estimate of her value, after having been taken to Newport News and repaired, would be £14,000 (pp. 188, 189). The amount for which she was insured was £18,000, subsequently reduced to £16,000, but those amounts were book values only and had regard to the fact that the steamship was bought at a time when steamship tonnage was 15 per cent. dearer than it was at the time of the salvage service (fol. 565).

As the libelants have adduced no evidence in contradiction of this, the value of the vessel should be taken, for the purposes of the suit, at approximately $70,000.

B. As regards the Salvors.

4. *The degree of danger to human life.*

There is no intimation in the libelants' testimony that there was any danger to their lives in the performance of the service. Claimants' witnesses testified that there was no such danger (fol. 875). The weather was fine when the salvors came and the sea was smooth, and both continued the same during the two days the salvors were at work (fols. 880, 881, 900, 908, Official Record, p. 326).

5. *Their skill and conduct.*

The circumstances were not such as to require the exercise of a high degree of skill or the exhibition of intrepidity or heroism on the part of the salvors. Their plant was conducted from Galveston to Velasco upon a small schooner in tow of a tugboat. We know by the weather record (p. 326) that the weather was fine during the passage. At Velasco anchors were transferred to Brock's barge, and from the barge were planted on the steamer's starboard quarter (fol. 900). They then took the steamer's anchors from the bow onto the barge and planted those upon the other quarter. The fifth anchor was placed

on the starboard side. Rope cables were attached to the chain cables and carried aboard the steamer, each cable being put around the drum of two winches. The vessel's winches did the pulling, by the aid of which she was floated (fols. 171, 172, 873, 875, 881, 895, 900).

6. *The value of the property employed in the salvage service.*

This the libelants have not attempted to show by any competent evidence. Libelant Clarke did not touch the subject at all, though twice examined. There are vague statements at different places in the testimony that a plant of considerable value was in use, but no definite information as to its value appeared to be obtainable. It was suggested that two tug boats and two schooners, with a large number of anchors and cables, had been used, but upon cross-examination of Captain Clarke, it appeared that only one tug and one schooner were used (fol. 187), with Captain Brock's barge. The value of the tug was not shown; moreover the tug was not used, except to free the vessel when she touched the jetty, after being carried over against it by the current, owing to the absence of any anchor on the port side. The steamer was then in deep water, and the touching upon the jetty was evidently a trifling matter. The schooner did not belong to Clarke, but was only chartered to take the anchors down from Galveston to Velasco. The agreement of charter was $35, but $100 was paid (fol. 476). Brock's barge is said to have been worth about $6,500, but there is no suggestion that it was actually in any peril (fol. 164). Some of the witnesses testified that a large number of men, as many as 25 or 30, were taken down from Galveston, but Clarke himself admits that 15 or 16 all told was about the number (fols. 156, 157). The number of anchors was not clearly shown, nor was any attempt made to state their value, nor that of the cables. $20,000 would apparently be a liberal estimate to cover the value of the property employed by the salvors in the service.

7. *The danger to which the salvors' property was exposed.*

The salvors did not themselves testify to any danger to their property, in the condition of wind and sea which actually prevailed. Clarke said not a word on the subject. This point, therefore, need not be discussed.

8. *The time and labor expended in the performance of the salvage service.*

Clarke appears to have received notice from Moller on the 11th or 12th that his bid was accepted. It was not actually accepted, but let that pass for the present. He thought it was accepted, and on the 13th and 14th was making his preparations in Galveston (fol. 154). On the 14th he went with his tug and schooner and outfit from Galveston to Velasco (fol. 187), where on the afternoon of the 15th the contract was signed. On the 16th and on the 17th until about three o'clock (fol. 900) the salvors were engaged in laying the anchors and connecting the tackle with the vessel. They began to haul at about three or half-past three (fol. 900), and at half-past seven the ship was free of the ground and proceeded to sea (Mate's log, fol. 950; Engineer's log, fol. 960). The whole of the time occupied in hauling her off the beach after they began to pull was therefore about four hours (fols. 873, 889, 900, 901, 910).

9. *Responsibilities incurred in the performance of the salvage service, such as, e. g., risk to the insurance, &c.*

No evidence produced by the libelants upon this subject.

10. *Loss or expense incurred in the performance of the salvage service.*

There was no evidence of any items under this head.

An analysis of the service, by considering its elements separately and apart, shows that it was not such as would ordinarily induce a court of admiralty to give a liberal award.

In its essential features, this case is strikingly like the case of The *Hesper*, 18 Fed. Rep., 696, where the Circuit Court of this circuit reversed the decree of the District Court for the Eastern District of Texas (18 Fed. Rep., 692), and reduced the salvage from $8,000 to $4,200. A comparison of the two cases shows the following results:

1. The *Hesper* stranded December 12, 1882, on Galveston Island.	1. *Elfrida* Stranded October 5th, near Velasco.
2. Her value was £22,000.	2. Her value about £14,000.
3. Her net tonnage, 1,069 tons.	3. Net tonnage, 1,454.
4. Supplied with winches and windlasses.	4. Ditto.
5. Had a cargo of 900 tons of salt.	5. No cargo.
6. Went ashore at a speed of about 4 knots an hour.	6. Drifted ashore.
7. Struck easily, without shock, and remained upright.	7. Ditto.
8. Her draught, 13 feet 9 inches.	8. Draught 11' 6" (fol. 804)
9. Sea smooth; very little wind from the south.	9. Sea moderate; wind S. E.
10. Ship headed Northeast by North.	10. Headed about N. W.
11. Efforts made with Kedge anchor and engines to heave her off.	11. Ditto.
12. Assistance called for from Galveston.	12. Ditto.
13. December 12, P. M., small tug *Estelle* sent to her assistance.	13. Oct. 6th and 7th, Brock's tug assisting.
14. Ineffectual efforts made by *Estelle* for two hours to float the ship.	14. Efforts of Brock's tug ineffectual.
15. Sea subsequently became turbulent.	15. Ditto one day.
16. *Estelle* left the *Hesper* the same night.	16. *Elfrida* awaiting assistance 4 or 5 days.
17. December 13, the *Hesper* shifted her position slightly; pumped up her ballast tanks; threw cargo overboard.	17. *Elfrida* remained in same position.
18. December 13, tug *Buckthorn* and a steam lighter took a heavy anchor and cables and two hawsers to the steamer.	18. Oct. 16th, *Josephine* and barge planting anchors.

19. On the 14th *Buckthorn* planted the anchor at sea in 18 feet of water, and carried her cables 210 fathoms to the *Hesper's* steam winch.	19. Oct. 17th, ditto until 3 P. M., and bringing cables to winches.
20. Same day men engaged throwing over cargo.	20. Pumped out ballast.
21. *Hesper* hove on hawsers and used her engines, *Buckthorn* assisting with line, with no effect.	21. Same day *Elfrida* hove on hawsers and used propeller. Came off in 4 hours.
22. December 14, tug *Estelle* arrived alongside; another lighter came alongside; taking off cargo.	22.
23. Same day, when a third of the cargo had been removed, and the water ballast pumped out, the steamer was got off by the use of her own engines, and her steam winch pulling on the one anchor, *Estelle* and *Buckthorn* assisting by pulling on line.	23.
24. Time employed in the service, three days.	24. Two days.
25. Value of salvors' property employed, about $35,000.	25. Say $20,000 (big estimate).
26. Place where *Hesper* was stranded, slope of ground seaward was gradual, bottom sandy.	26. Ditto.
27. During the time the *Hesper* was aground, there was no wind or sea of any danger to ships, and the services rendered to the *Hesper*, aiding her to get off, were not attended with any hazard or danger.	27. Ditto.
28. The value of the *Hesper*, which was entirely uninjured, was $100,000, and her cargo, $6,500.	28. Value of *Elfrida*, say $70,000 No cargo.
29. The *Hesper* had no protection against wind or sea, from any direction.	29. *Elfrida* had protection of jetties against all winds from N. E. to S. E.
30. The amount of the award in the *Hesper's* case, $4,200.	30. $22,000, with interest.

The only material point upon which no comparison between the cases is made relates to the extent to which the vessels rested in the sand. From the comparatively greater ease with which *Elfrida* came off, it is a fair inference that she was not harder aground.

By analogy to the *Hesper* case, it would appear that an award of $5,000 might reasonably have been expected for such a service if the amount had been left to the Court.

We have not been able to find any other reported cases bearing close resemblances to the present. It may be instructive, however, to notice a few cases where the peril was much greater and more imminent, the service much larger and more arduous, the values risked and saved far above those involved here, where the Courts have nevertheless awarded relatively not more than one-third of the amount here recovered.

Guadalupe, 20 Fed. Rep. 443.

In *Pent* v. The *Ocean Belle*, 19 Fed. Cases, 200:

A ship with cotton, stranded 30 miles from Key West, and was hauled off in good weather by 8 wrecking vessels, with 64 men, and a steam propeller with 21 men, after lightening her of 1140 bales of cotton. She was then towed around an extensive shoal, about 70 miles, to the harbor of Key West. MARVIN, *J.*, awarded $13,000 upon an aggregate value of $165,000, it appearing that had the weather been bad, the ship would have been in great peril of total loss.

In the *Diadem*, 7 Fed. Cases, 632: A ship and cargo, of the estimated value of $125,000, on a voyage from New York to New Orleans, got ashore on Long Key, where she was in imminent peril of total loss, from which she was saved by the libelants with their vessels, which carried 68 men and 28 men in small boats. For this service MARVIN, *J.*, decided that $12,000 would be reasonable salvage; but that in consequence of negligence and errors of judgment of the salvors and delay in getting the vessel off the reef, this amount should be diminished one-half.

In the *North Erin* (71 Fed Rep., 430, deficiently reported), a large steamship with a cargo consisting chiefly of green

fruit, ran ashore on the outer end of Long Island, at a speed of 7 knots in fog, and at the top of high water. She was immediatly swung around by the sea until she lay broadside on a quicksand beach, in which she settled about one and a half feet. She was unable to move by her own power or anchors, and in case of a rising sea would have been in a critical position. A powerful wrecking tug, of large value, with the owner aboard, came 80 miles to her assistance, and at the next high water, after pulling about three hours, having the assistance of the steamer's engine and sails, dragged her off into deep water. The tug was engaged going and coming for two days and supplied hawsers and appliances. The green fruit would have been greatly damaged by any considerable delay. Neither ship nor cargo suffered any damage. The salved values were about $100,000. The Court, upon the special facts, awarded $10,000.

By this comparison of results it appears that the libelants have recovered three or four times as much as any Admiralty Court presumably would have allowed them. So great an excess in their agreement, we submit, is unreasonable and inequitable towards the property charged with its payment, and fairly justifies an Admiralty Court, as a court of equity, in setting the contract aside.

II.

The District Judge erred in holding that the libelants performed the contract in strict accordance with its provisions, so as to entitle them to the payment of the agreed sum. He should have found that the libelants used means and appliances belonging to the ship, in addition to those specified in their contract, and that, accordingly, compensation should not have been awarded under the contract, but only on the basis of *quantum meruit*.

The agreement provided:

"That for and in consideration of the covenants and agreements herein contained, on the part of the said party

of the first part to be kept and performed, said party of the second part agrees and binds himself * * * to float and place in a safe anchorage, Quintana or Galveston, said steamship *Elfrida* which is now stranded * * * at the mouth of the Brazos * * * and *furnish all* labor and *material at the cost of said party of the second part*" (fols. 139, 140). * * * "It is also agreed and understood that the use of crew and *engine* shall be at the use and disposal of said party." * * * "Said party of the first part agrees to pay said party of the second part for such services, that is, *when he shall have successfully floated said ship, as above set forth*, the sum of $22,000" (fol. 140).

It will be observed that there is no provision in this contract for the use of any of the ship's appliances except the *engine*. Unless, therefore, libelants removed the vessel from her stranded position with their own appliances "and material" and without any appliances of the ship except "*the engine*," strict performance of the contract has not been proved, and as such strict performance was an issue in the case, libelants would not be justly entitled to recover upon the contract, although, under the admission of the performance of salvage services in the claimant's answer, they would be entitled to such salvage compensation as the Court might award.

At the hearing of the case (p. 46), counsel for the libelants put in the contract (fol. 138), and then called Charles Clarke as a witness. Upon his cross-examination he admitted that he used two of the ship's bow anchors, which weighed about 3,000 pounds apiece; that he used the ship's [anchor] cables, making his own hawsers fast to the end of them (p. 56), and that, in addition to the use of the engine (which operates the propeller) (fols. 171, 881), he used the steamer's "winches" (pp. 56, 57). It further appeared that in addition to using the steamer's four winches (fols. 329, 873, 881, 335) libelants availed themselves of and used her steam windlass (fols. 873, 329).

Upon this state of the evidence, objection having been made that strict performance of the contract was not proved, but, on the contrary, the evidence showed that ship's appliances not contracted to be used had actually been used in floating her, and the District

Judge having stated to counsel that he was unfamiliar with winches and engines of steamships, the claimant called as an expert James Band, a marine engineer of twenty-five years' experience, fifteen of which had been spent at sea, who was then chief engineer of the steamship *Ludgate*, of London, which was lying in port (fol. 535).

Mr. Band's evidence (pp. 179–181) was as follows:

"Q. What experience have you had? A. Eighteen years at sea; twenty-five years at the business altogether.

Q. Will you describe to the Court what a steam winch is, and where it is located, and how many there are? A. In ordinary cases there is one at each hatch, and in some cases there is two on the bigger class of ships.

Q. Do you know the *Elfrida?* A. I have seen her once or twice in different harbors.

Q. How many winches did she have? A. I could not say exactly, because I had no interest; merely seen her as another ship in harbor; but, according to her build, I should think she had four holes [holds?], and in that case she would have four winches and windlass.

Q. Will you describe the construction of the steam winch; what is it? A. It is a hoisting engine for taking cargo in and out.

Q. And there are four of them? A. Yes, sir; on that class of ships there is one at each hole [hold?].

Q. Is it fixed on deck? A. Yes, sir.

Q. Is there any connection between that and the engine's boiler? A. None.

Q. Is a steamship fit for use, in every way, without any winches at all? A. Yes, sir.

Q. From what source is the steam to the winches supplied? A. In ordinary cases there is a winch boiler—what we call a donkey boiler.

Q. From what source is steam supplied to the main engine, or that which drives the engine? A. From the main boiler.

Q. On board a ship in port, when you receive, as engineer, an order to get up steam, what do you get up steam for? A. For the main engine.

Q. Is it part of an engineer's duty to get up steam on the donkey boiler to run the winches, without an order for steam for the winches? A. We have to put it in the log book what the steam is for, and where it is to be applied.

Q. Are winches built in England by the same firms who build engines? A. No, sir.

Q. They are furnished by different builders? A. Yes, sir.

Q. Describe the steam windlass of a ship, and where it is situated? A. It is placed in the stem of the ship and sometimes it has an engine of itself, and other times it is only a windlass, when we generally call it the forward winch.

Q. Do you know which the case was on the *Elfrida?* A. I do not.

Q. The steam windlass, as I understand it, works perpendicularly? A. That is the capstan; the windlass is a horizontal shaft.

Q. And winches have horizontal shafts, also? A. Yes, and some vertical. The older style was diagonal and the new style is horizontal.

Q. In fact, besides the main engine which drives the ship on vessels of this class, to the best of your recollection on the *Elfrida* there were four or five smaller engines? A. Yes, sir.

CROSS-EXAMINATION:

Q. A winch is a hoisting or winding engine? A. Yes, sir.

Q. And a steam capstan is sometimes also an engine? A. Yes, sir; or it can be driven from another engine.

Q. If it is operated by steam, the propelling power is furnished by an engine? A. Yes, sir.

Q. And are not winches sometimes driven by steam from the main boiler as well as by the donkey boiler? A. It is possible.

Q. When they want engine power and they have all the winches running at the same time, don't they supply the steam from the main boiler? A. Yes, when it is wanted in emergency.

REDIRECT EXAMINATION:

Q. Suppose a ship is on the beach and a contract is made with the salvage company [salvor?] by which he agrees to furnish material and appliances to get her off; suppose that he is to have the use of the steamer's engine, as an engine [engineer?], would you understand that to include the use of the winches?

Objected to as a matter of opinion. Objection overruled.

A. No, sir."

At the conclusion of Band's evidence, Captain Clarke was recalled, and made an effort to vary the contract by parol evidence that it was agreed that the salvors should have

the use of the winches in addition to the main engine, but upon objection the Court excluded the evidence (fol. 543). There was no such issue.

Further examined on the same line, Captain Clarke testified:

"Q. Is it necessary to use the engines in using the winch? A. No; there is a regular donkey engine, and you can either supply the steam from the donkey engine or the main engine" * * * (fol. 543).

"Q. The engine runs the winch? A. Yes, sir; the *steam* runs the engine *and the winch*" (fol. 544).

"Q. The main engine has nothing to do with the donkey engine? A. No, sir" (fol. 545).

Clarke had the right idea, but was confused by his counsel's assumption that it is the engine instead of the *boiler* that runs the winches. The engine is that large and complicated machinery by which the propeller is revolved.

In the Century Dictionary, an "engine" is defined as: "a machine for applying any of the mechanical or physical powers to effect a particular purpose; especially a self-contained, self-moving mechanism for the conversion of energy into useful work, as a hydraulic engine for utilizing the pressure of water; a steam, gas or air engine in which the elastic force of steam, gas or air is utilized."

It appears, therefore, that in the ordinary, as in the technical use of the term (as explained by Band), the boiler is no part of the engine; that the winches are no part of the engine. Steam from the main boiler runs the engine; steam from the donkey boiler commonly runs the winches, but the winches may be run by steam from the main boiler. The winches are hoisting engines; each of them is a separate engine; there were four of them on deck besides the windlass, all of which libelants used, in addition to the main engine which they used on the propeller. *The winches are not and cannot be operated by the engine.* Therefore in using the winches and windlass, libelants did not use the engine, but used four or five separate and additional engines besides "the engine."

This being the only evidence in the case upon the subject, it clearly appears that the libelants not only used the engine, the right to which was secured to them by the contract, but they used the winches and windlass, the right to which was not secured to them by the contract. The pleadings do not allege any supplemental contract, hence the master's implied assent to their use is immaterial. His assent to the use of the anchors, cables and winches shows nothing more than that he was willing the salvors should use every available means to float the ship, because of his anxiety to get her off (fol. 936). It is not equivalent to an admission that anchors, cables and winches are an "engine," and has no relevancy or bearing in the present suit between the salvors and the shipowners' property where the question of strict performance is in issue.

There is no shadow of claim that the right to use the anchors was secured to the libelants by the contract. That they did use them they freely admit; that libelants needed them is also shown by the evidence that Clarke brought only three anchors with him (fols. 874–5) and telegraphed to Galveston for another to be brought down on a chartered schooner (fol. 725). The answer was that one anchor was there (fol. 725). A schooner appears to have been chartered to bring it down, but it was not used, if it arrived (fol. 187). He claimed to have had others at hand, but there was no specific proof upon the subject, and he was unable to give any satisfactory reason for asking his son to send another (fol. 548).

Clarke, recalled, feebly pretended that he took the anchors off the bow to lighten the ship (fol. 545), which he was entitled to do under the contract. But obviously the right to take them off so as to lighten the ship did not imply the right to bury them in the Gulf a thousand feet away from the ship and use them and the ship's chain cables in getting her off the beach.

The issue of strict performance of the contract having been clearly presented in this cause, to which the master is no party, and having been carefully litigated, and it appearing indisputably that the contract was not strictly performed according to its provisions, the District Judge,

we submit, erred in awarding compensation as and for a right and true performance. He should have awarded simply a salvage compensation on the admissions of the claimant's answer.

Boudies v. Sherwood, 22 How. 214

III.

The Court below erred in awarding recovery for the full amount stated in the agreement.

No formal opinion was filed by the District Judge, but it appears from the final decree (p. 327) that the Court found from the evidence "that such contract was a lawful contract, and that the same was entered into by the said master of said steamship with full knowledge or means of knowledge of the said master and of the owners of the said steamship of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions" (fols. 981, 982).

It will be observed that the Court makes no finding upon the point whether the amount of the award, $22,000, was a reasonable or unreasonable reward for the services actually performed.

In asking this Court to disregard the contract as unreasonable and for an excessive amount and to modify the decree by awarding the salvors a salvage compensation on the basis of *quantum meruit*, our first inquiry must be whether the case of the *Agnes I. Grace*, 2 U. S. App., 317, decided by this Court, stands in our way. This was the case chiefly relied upon in the District Court, and upon which apparently the District Judge relied. A brief review of that case is, therefore, necessary. We take the facts as reported in the opinion of the District Judge.

The *Agnes I. Grace* was a schooner bound for Port Royal, South Carolina, loaded with a cargo of jute bagging, which had put into Tybee Roads, at the mouth of the Savannah River, under stress of weather. Coming in

at high tide, and being off her bearings, she had "passed over shoals where at low water the depth is from one to three feet for more than two miles by the scale, and that the point where she finally went hard aground was on a spot marked on the chart as 'dry.'"

This position was found to have been one of very great peril:

"She was exposed to the full force of the sea and the winds, should winds from the northeast, east or southeast prevail, and indeed, the evidence is that she was as much exposed to the winds from those directions as if she had been entirely outside of the bar, and on a shoal exposed to the full force of the Atlantic rollers."

Libelants' expert, Captain Hutchings, the superintendent of the Life Saving Station, knowing the comparative danger of vessels stranded in the Gulf and on the Atlantic coast, testified:

"Q. You do not mean to say that this coast along here is as dangerous for a vessel to strand upon as the North Atlantic or Carolina coast? A. No, not in the general acceptance of the term.

"Q. That coast is much more exposed to more violent storms? A. Yes, sir. It has the broad Atlantic Ocean to sweep against it" (fol. 383).

The *Grace* was sunk from two and a half to three feet in the sand, and a hole had been knocked in her bottom on the starboard side on the turn of the bilge, probably by contact with the anchor, admitting water into the hold. The sea rose and fell in the vessel with the rise and fall of the tide. She was in quicksand, and the testimony in the present case shows that a wooden vessel with her bottom broken, stranded on a quicksand beach, is practically lost.

Judge SPEER said (2 U. S. App., 323):

"It is also true in the opinion of the Court, that the skill exerted, and the labor expended, were great; that the libelant labored for several days, when making this rescue; and after the rescue was made, it was only by the presence of its powerful steam pump continually exerted,

that they were enabled to keep the vessel afloat; and only with the presence of that steam pump, a wrecking pump worked by the assistance of the steam of a tug, and at imminent hazard to the tug, wac it possibble so to relieve the vessel of the water in her hold as to enable her to float. The testimony of Willink, the ship carpenter, who repaired her, is that she barely escaped sinking in the river at his yard, when the pumps were stopped for a short time."

The cargo saved amounted to $7,000, and the Court found that the price at which the bark sold, namely, $5,030, was only a moiety of her value. The salved value should, therefore, be taken at about $17,000.

The Court upheld the contract for $5,000 for salvage, and added the sum of $210 to the contract for pumping services in keeping her afloat after she was floated, but upon the express finding (2 U. S. App., 322), that "*the contract stipulates for but a moderate charge for the services* RENDERED *in this case, and it is perhaps true that if a larger demand had been made, a larger allowance would have been permitted by the Court.*"

As to the weight and bearing of the contract upon the amount of the award, Judge SPEER further, and as we submit correctly, said (p. 322):

"It is true, as is insisted by the respondents' counsel, that a contract of this character is not binding upon the Court, and that in all cases of salvage it is competent for the Court to adjudge and assess the amount of the recovery in accordance with the equities of the case, and, if it should appear that a contract of this character was an inequitable one, the Court would, of course, disregard it. But, whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable as evidence to enable the Court to arrive at a just determination. The Court regards this contract as evidence in that light, and not as a conclusive contract; but it is a most significant and valuable indication of what should be the true amount of the recovery."

Upon the appeal, similar observations were made in the opinion of Judge LOCKE (p. 329) and at the conclusion of the opinion (p. 330) he said:

"Before the performance of the service, the agreement appears to have been considered by all fair and just, and if so, then it cannot now be considered otherwise, because of its successful rendition by the appellees, who had assumed all expense and risk. Although the amount given may, under the circumstances, appear high in proportion to the value of the property saved, this Court does not deem it sufficiently unreasonable to disturb the judgment of the Court below."

It must be remembered that these words were spoken in a very different case from the present. In the one case, the vessel was a wooden schooner, with a hole in her bottom, and the water rising and falling inside of her with the rise and fall of the tide, while in the other, we have a staunch iron steamer, wholly undamaged. The schooner was lying where at low tide she was more than two miles from water sufficient to float her, while the steamer had not crossed any bar, and with a rise of tide of only 3 feet, was floated by being hauled a thousand feet; the schooner having no propeller or winches or steam pump, was without the means of helping herself or of aiding the salvors to get her off; the *Elfrida*, with the aid only of three of the salvors' anchors, hauled herself off with her own power. The schooner was without adequate pumps; the *Elfrida* not only was well supplied with pumps, but had a double bottom and tanks extending from stem to stern. The schooner was imbedded from two and a half to three feet in the sand; the steamer, with her water ballast pumped out, probably about six inches, if not wholly free at the stern. The schooner was exposed to the storms of the Atlantic coast, in imminent peril from any wind from the northeast to southeast; the steamer was protected by the jetty from any wind more northerly than southeast, and was lying on a far less dangerous coast. On the one hand, the amount awarded was found to have been a moderate compensation for the service performed; there is no contention in the present case that the amount awarded was moderate or reasonable, apart from the contract. That the percentage of the recovery is substantially the same in both cases is unimportant, for the reason that in all

cases where percentages have been considered in salvage awards the rate has always been diminished as the values saved have increased in amount.

Cases might readily be cited to the Court where compensation in the amount awarded in the *Agnes I. Grace* has been awarded for salvage services, irrespective of contract, but the learning and zeal of the learned counsel for the appellees will not be able to cite any case to the Court where $22,000, or a half of it, has been awarded as salvage compensation for a service similar in its essential elements to the case now in hand.

We conclude, therefore, that the *Agnes I. Grace* does not preclude an argument that the Court should disregard the contract in the present case, and we proceed to consider some of the authorities bearing on the right and discretion of the Court to do so, and to award a salvage compensation instead.

General Doctrine.

The practice of setting aside agreements for salvage services, upon the ground of excess, extends very far back in the history of law.

In *The Roll of Oleron*, Art. 4 (2 Black Book of the Admiralty, Twiss, p. 437), a compilation of maritime judgments made near the end of the twelfth century, the rule is laid down :

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in, the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgment."

In 2 *Parsons Shipping & Admiralty*, *p.* 306, the rule is stated:

"If at the time of the service, the salvors make a bargain with the owners of the property in peril, or their servants, as to the amount of salvage, this is *enforced by the*

Court only so far as it seems equitable and conformable to the merits of the case, and it is wholly disregarded, if it be deemed unconscionable and oppressive to the owners of the property saved, or entered into under circumstances which amount to compulsion."

In *Jones on Salvage* (pp. 97, 98), it is said:

"The Court will also refuse to recognize an agreement where the master improperly or recklessly contracts to pay the salvors an exorbitant amount. In the *Theodore*, Swabey, 351, the salvors induced the master of a vessel which had parted from her first anchor and was driving, with another anchor down, but was otherwise in no danger, to enter into an agreement to pay them £200 for bringing the vessel into port, which they did after a service of about four hours; the Court held the agreement to be an exorbitant one, and pronounced against the agreement and for the sufficiency of a tender of £50 by the owners. * * * If, on the other hand, the agreement should be unjust or inequitable towards the salvors, the Court will refuse to recognize it. And where the owners of a vessel to which valuable services have been rendered whilst she was in a position of considerable danger alleged that the salvors agreed to do the work for eight shillings six pence, the Court regarding this amount as futile, gave the salvors £10 and costs. In *The Phantom*, L. R., 1 Adm., 58, Dr. LUSHINGTON, p. 61, said: 'However much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement, if it is unjust and inequitable' (The *Kingalock*, 1 Spinks, 263)."

These passages from Parsons and from Jones are cited with approval by the Supreme Court of the United States in The *Tornado*, 108 U. S., 110.

In *Marvin on Wreck and Salvage, Sec.* 119, it is said:

"It is also competent for the parties interested to agree upon a stipulated sum, as a salvage reward, for the rendition of salvage services, to be paid only in the event that such services save, or contribute to save, the property. Such an agreement does not alter the nature of the service as a salvage service; but only fixes the rule by which the Court is to be governed in awarding the compensation (Schooner *Emulous*, 1 Sum., 207; *Bearse* v. *Pigs of Copper*, 1 Story, 323; *Otis* v. Brig *Whitaker*, 18 Law Reporter, 496).

It is within the authority of a master of a vessel in distress to enter into such an agreement; and, also, within the authority of the master of a salving vessel to bind his owners and crew by such agreement (The *True Blue*, 2 W. Rob., 179). When such agreement is fairly made and fully understood by the salvors, and the condition of the ship is fully disclosed to them or known by them, it will bind them and become the measure of their compensation; notwithstanding a change of circumstances may increase the labor and difficulty of performance beyond what was originally contemplated by them. But if the condition of the ship was unknown to them, or not disclosed to them, the agreement will not bind them (The *Kingalock*, 26 Eng. L. & Eq., 596; The *True Blue*, 2 W. Rob., 180; The *Graces*, Id., 294; The *Henry*, 15 Jurist, 183; 2 Eng. L. & Eq., 564; The *Resultatet*, 22 Eng. L. & Eq., 620; The *Firefly*, 29 Law Times, 147). And *such agreement will not be binding upon the master, or owner of the property, unless the Court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable.* 'This doctrine is founded upon principles of sound policy, as well as upon just views of moral obligation. No system of jurisprudence founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice' (The Schooner *Emulous*, 1 Sum., 207; *Laws of Oleron*, Art. 4)."

KENNEDY'S *Law of Civil Salvage*, p. 208, states the rule:

"It is not, however, it is submitted, only where it is proved that there has been unfair dealing in the shape either of fraud or misrepresentation, or practical compulsion, that the Court will interfere with an agreement which fixes a grossly excessive remuneration. Evidence of any such unfair dealing, greatly strengthens, of course, the case against the agreement, but even without such evidence, if it finds the exorbitancy to exist, however that exorbitancy originated, the Court will, alike on principle and on authority, be justified in setting aside the agreement.

The propriety of disregarding an agreement, if the amount of the award appears to the Court to be inequit-

able, has, indeed, been recognized by the maritime law from very early times."

KENNEDY, at page 208, further says:

"The duty of an admiralty court to set aside a salvage agreement for an excessive reward, where the salvor has been able practically to dictate his own terms, has been nowhere more powerfully stated than by Story, *J.*, in The EMULOUS (1 Sumn., 207, at pp. 210-211):

"'No system of jurisprudence purporting to be founded upon moral or religious, or even rational, principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive, and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice.'"

In *Wendt's Maritime Legislation* (*3d Ed.*), *London*, 1888 (*p.* 751), the rule of the *German Commercial Code*, as stated in Article 743, is translated as follows:

"Art. 743. When during the danger an agreement has been made as to the amount of the salvage or payment for assistance, such agreement may nevertheless be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance with the circumstances of the case may be demanded."

The *Ellen Holgate*, 8 Leg. Gaz., p. 44; 8 Federal Cases, p. 509:

Here the contract was sustained as reasonable. Judge BRADFORD said (p. 510):

"As this was especially a salvage service, there must be a reward measured by the rules that apply to salvage cases, and *no contract can be permitted to stand which would compensate the salvors to a great degree more than they would be entitled to for a salvage service were there no contract;* but when it does appear that the contract was entered into fairly without any compulsion or taking undue advantage to make an unconscionable bargain, and in point of fact, in the judgment of the Court, the *price agreed to be paid did not much vary in amount from what*

the libelants would have been entitled to for a salvage reward, then in our judgment the contract should not be disturbed."

A steamer broke her shaft off the coast of England, and was towed by the *Coomassie* to Falmouth; the master of the *Coomassie* insisted on a contract for £6,000, which was signed. The towage lasted 3 days, and was for a distance of about 430 miles. The Court awarded £3,000 salvage, and in the course of its opinion (p. 178), said:

"It has been laid down that the sort of pressure requisite to invalidate an agreement of this nature, and made in such circumstances, is less than the duress required at common law to invalidate an agreement, and the question is: What amount of duress will have that effect? Again, the effect of the decided cases is to show that the agreement insisted upon by the salvors at the time must be inequitable; and then comes the question: What is an inequitable agreement in cases of this sort? On this point, two ingredients are commonly referred to. First, the parties contracting must be shown not to have contracted on equal terms. I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms—that is to say, the master of the salved ship being at a disadvantage—it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement. Now, I have no doubt that the parties stood, as they usually do in such cases, upon unequal terms. The question that follows is: Is £6,000 a wholly unreasonable, or, in other words, an exorbitant sum? I think it is, and, therefore, it seems to me that the two things necessary to invalidate the agreement exist here. That being so, and that being a matter entirely for me, the next question is: What amount should the salvors receive? That depends on the usual considerations applicable to cases of this sort."

The *Rialto*, 1891, Prob. Div., 175.

In *Post* v. *Jones*, 19 How., 150, the whaling ship *Richmond*, being wrecked on the rocks of Behring Straits, was sold by her master with her cargo of oil and whalebone to

satisfy agreements for salvage made by him with the masters of two other vessels.

The Court said:

"It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an *unreasonable* bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumn., 210). The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

The Court set aside the contract and allowed the salvors one-half the property saved (the cargo) and allowed them freight on the other half from the first port of safety in the Pacific Ocean to Sag Harbor, Long Island.

The steamer *Adirondack*, of 1502 tons register, bound from New York to Liverpool, with a cargo of cotton, grain and salt beef, and valued, with her cargo, at $300,000, broke her low pressure piston, thus entirely disabling her machinery for the time being. It would have been practicable, in two or three days, with the appliances on board, to get the ship under steam with the use of the remaining engine. While in latitude 59° 44″ west, about 450 miles off Halifax, the nearest port, and 662 miles from New York, she was taken in tow by the steamer *Plainmeller*, under a written agreement to pay £4,000 for towage to New York. This agreement was made only after the captain of the *Adirondack* had attempted unsuccessfully to obtain a lower price. It was held that the contract was unjust and made by parties not upon equal

terms; that it should be set aside and a decree entered for $7,500, the amount of a tender deposited in Court by the claimant.

CHOATE, *J.*, said:

"Upon these facts, I think there can be no question that the sum demanded by the captain of the *Plainmeller*, and finally assented to by the captain of the *Adirondack* (£4,000), was very largely *in excess of that liberal compensation which courts of admiralty award for* SIMILAR SERVICES, and that the amount tendered, which is a little more than £1,500, is fully up to the measure of salvage award which any court of admiralty would give for the service rendered.

"The *Adirondack* was in no present peril. She was temporarily disabled in her machinery, but unless overtaken by very tempestuous weather, her machinery could have been soon repaired so that she could proceed on her voyage. Her cargo was not perishable. There is no proof that the broken machinery endangered the safety of the ship. She was otherwise sound and able to keep the sea for an indefinite time. The place where she was was the open ocean, with no risk of going ashore. She had no passengers * * * In respect to the special contract for £4,000 in this case, it must be held that it was unjust and unreasonable in amount. *While there is no charge of fraudulent practice by which the agreement upon this sum was procured, there is evidence enough that the agreement was improvident and entered into without much consideration of the proper elements of a salvage award.*

"The contract recites that the *Adirondack* was totally disabled as to her machinery. This was true as to her temporary disability, but misleading as a statement of absolute disability. The captain of the *Plainmeller* insisted on his own terms and made the agreement to them a condition of rendering any assistance. I think he took advantage of the situation of Captain Robert to exact from his circumstances of present distress an exorbitant and grossly excessive amount. *The master of the Adirondack was inexperienced. This was his first voyage as master.* He knew little or nothing of machinery, and seems not entirely to have relied on what his engineer told him as to their ability to repair and go on under steam. His judgment was overborne by the pressure of the circumstances in which he was placed, to that degree which fully *justifies a court of admiralty in relieving the owners of his ship from the inequitable bargain into which he improvidently entered.*"

Brooks v. The *Adirondack*, 2 Fed. Rep., 387.

The steamer *Sirius*, valued with cargo and freight at $143,539, at anchor in a disabled condition, near an island off Lower California, in a situation which would be dangerous if a storm arose, was towed 320 miles to port, under a contract for $20,000.

The master of the *Tillamook* was willing, in the alternative, to furnish stores and gratuitously take an officer to San Diego to procure assistance, but the master of the *Sirius* was unwilling to take the risk of a storm arising in the meantime.

Action was brought upon the contract, but the Court of Appeals for the Ninth Circuit set it aside and entered a decree for $8,000, saying:

"In our view of the facts, therefore, the master of the *Tillamook* took an unfair advantage of his power and made an inequitable bargain not conformable to the merits of the case, and the towage contract should not be enforced."

The *Sirius*, 57 Fed. Rep., 851 (U. S. Circuit Court of Appeals, Ninth Circuit),
Reversing the *Sirius*, 53 Fed. R., 611.

In the *Cargo ex Woosung*, 1 P. D., 260, BAGALLAY, *J.*, said "the ground of exorbitancy of the agreement would be sufficient to set it aside."

In The *Kingalock*, *Spink's Reports*, 263, 265, a brig, disabled at sea, made a contract for towage to London, for £40. During the service, the master of the tug discovered that the brig had been very seriously damaged, which fact had not been transmitted to him. It was held that the mere concealment of a fact which might operate on the service, and therefore on the agreement, vitiates it. The agreement was set aside, and increased compention was awarded to the salvor.

The Court said (p. 265):

"An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there

should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud. * * * I therefore come to the conclusion that, as it might affect the performance of the service, the agreement was null and void *ab initio*."

CASES OF VESSELS STRANDED, OR AT PIERS, OR LYING AT ANCHOR.

It was argued before the District Judge that cases of vessels, which were stranded in a position where communication with the shore and salvage facilities were available, stood on a different basis from those where the contracts were made at sea, and that, accordingly, the statements of the Judges that parties contracting for salvage, *prima facie*, do not stand upon an equal footing, have no application to cases of this class.

We, therefore, bring under a separate head the cases decided with reference to vessels stranded or lying at anchor with communication to the shore, or while lying at piers in port, which we submit show that the rule is not different as applied to such cases.

In the *Tornado*, 109 U. S., 110, where a contract had been made in the City of New Orleans by the master of a vessel in distress, to pay certain tug boats $50 per hour for pumping services until the vessel should be discharged, and a suit was subsequently brought against the vessel and cargo for this amount, when it was found that the water had all been pumped out of the ship twelve days before the discharge was finished, the Court held that the contract was not binding upon the property sought to be charged and set it aside as inequitable. Mr. Justice BLATCHFORD said:

"Every agreement for salvage compensation 'is subject as to amount' to the judgment of the Court as to its being equitable and conformable to the merits of the case. 2 *Parsons on Shipping*, 306; the *Helen and George*, Swabey, 386; *Jones on Salvage*, 94, *et seq.*"

It is worthy of remark that the Court did not limit the application of this rule that every agreement for salvage compensation is subject as to amount to the judgment of the Court as to its being equitable and conformable to the merits of the case to instances where the contract is made at sea, but on the contrary, expressly applied it to a case where the contract was made in a port, where any quantity of similar assistance must have been immediately available.

The barge *Jenny Lind*, worth with her cargo $25,000, was aground on a bar in the Mississippi in such a position as to be in some danger of breaking in two. Her captain made a written contract to pay the salvors 50 per cent. of the value of the property saved. In an action for salvage, the contract was set aside and a decree rendered for one-sixth. The Court said, per McCaleb, *J.*:

"Such contracts as the one which he [the captain] *thought proper to execute in favor* of the libelant [Williams] will be recognized no further in a court of admiralty charged with a case of salvage than they accord with its own equitable discretion in filling the *quantum* of compensation."

The *Jenny Lind*, 1 Newberry's Adm. Rep., 443.

A ship valued at $25,000, laden with a cargo of sugar worth $50,000, and drawing 14½ feet of water, went aground upon a rocky ridge, extending obliquely under her from the starboard quarter nearly to the port bow, upon which there were but 12 feet of water. Under a written contract, which was attached to the libel, by which the master, being unable to obtain a better offer, agreed to pay $10,000 for getting his vessel afloat, she was hauled off after 20 hours' work by means of a partial discharge into schooners and by heaving upon a large hawser made fast to an anchor. The contract was set aside and an award made of $7,875. Locke, *J.*, said:

"The contract which was made between the master and the salvors can have no binding force upon the owners, *as although probably no especial force or influence was brought to bear upon the master, yet the position*

in which the property in his charge was placed and the necessity of immediate action compelling the contract, is recognized in admiralty law. It certainly cannot be said that no advantage was taken of the master on account of the position in which his vessel was placed, as that position was the very foundation of the contract. It was not a voluntary contract on his part. * * * If, from any mistaken idea in regard to the delays and expenses of the Court, he desired to make a bargain rather than to submit to a judicial decision, he was, nevertheless, from the surrounding circumstances, forced to make one that his unbiased judgment would not have approved, had it not been for the position in which he was placed. It was out of his power to obtain assistance in any other way. There were no competing bidders for work, and he was compelled to make the best bargain he could, no matter how inequitable it might be."

The *Tennasserim*, 47 Fed. Rep., 119 (District of Fla.).

The Court thereupon awarded $7,875, together with costs, charges and expenses to be taxed.

See also

The *Don Carlos*, 47 Fed. Rep., 746.

In The *Sophia Hanson*, 16 Fed. Rep., 144.

BENEDICT, *J.*, said:

"If this action was based upon a contract made between the master of the schooner that grounded on the West Bank in the Lower Bay of New York harbor, and the tug that pulled her off, as a contract for towage, the libelant could not recover for the reason that the Court would not enforce an agreement to pay $1,000 for a few hours of ordinary towage service, such an agreement being clearly unconscionable. But the action is not based upon contract. The claim rests upon a salvage service performed. *In such an action the agreement of the master to pay* $1,000 *for the service is by no means conclusive on the question of the amount of salvage to be awarded* * * * That service consisted simply in pulling the schooner off the West Bank where she had grounded on an ebb tide, having missed stays * * * I consider $500 to be a liberal salvage compensation."

Where an agreement was made between the captain of a steamer and the owner of a stranded vessel that the

former should render such salvage services as might be necessary at the rate of $450 per day, the Circuit Court refused to disturb a salvage award of the District Court equal to the stipulated amount, NELSON, *J.*, saying:

"That contract was not necessarily binding upon the vessel in peril, or upon her owner, and it would have been the duty of the Court to have disregarded it altogether, and to have awarded a rate of compensation according to the principles of admiralty in salvage cases, if any advantage had been taken by the libelant in fixing the rate in the agreement. The rate thus fixed is looked at in determining the amount proper to be awarded for the salvage service; but would be disregarded, *if disproportionate and unreasonable*, OR *if extorted through the pressure of impending calamity.*"

The *A. D. Patchin*, 1 Blatchford, 414.

A canal-boat, loaded with coal, sank in the Kill Von Kull, and the master made a written contract with the libelant to award him 60 per cent. of the value of the cargo (which would amount to some $900) for his services in raising it.

In an action setting up the contract, and praying for such salvage award as might be just, the contract was disregarded and $250 awarded.

BENEDICT, *J.*, said:

"Agreements to pay for salvage services, made by masters of canal-boats, when with easy reach of all parties interested in the property to be saved, are subject to be closely scrutinized, and will not be upheld in a court of admiralty when it appears that the price agreed on by the master is unreasonable or exorbitant.

202 *Tons of Coal*, 7 Benedict, 343.

A schooner lying at a pier on the other side of which a vessel was burning was hauled out into the stream by a tug, under an agreement by the mate in charge to pay $500. The libel was based upon the contract.

BENEDICT, *J.* (p. 180), said:

"The contract upon which the libelant relies was entered into when the vessel was actually in no great peril, for the weight of the evidence is that steam fire engines were upon the dock, which proved able to prevent the

dock shed from catching fire, and which were able to have preserved the schooner, even if the shed had caught fire. There was, nevertheless, apparent peril, sufficient to affect the judgment of the mate in charge and to justify a desire to move the schooner. * * * For such a service, the demand of $500 appears to me exorbitant. The circumstances did not justify the making of such a demand, nor the acquiescence in it by the mate. The amount should be reduced to $100."

The *Jacob E. Ridgway*, 8 Benedict, 179.

A tug, having a brig in tow to bring into the harbor of New York, carelessly ran her aground on the Romer Shoal off Sandy Hook and was unable to pull her off, but on the next morning, another tug coming to the spot, the master of the brig made an agreement to be towed off for $2,500, and the two tugs got the brig off. *Held*, upon a libel for salvage, that the agreement was exorbitant, and that the $1,250 was a sufficient compensation for the service, of which sum the second tug was entitled to one-half, but the other tug, having been the cause of the disaster, would not be allowed to get anything.

The *Homely*, 8 Benedict, 495.

A libel was filed for a salvage service, which consisted in towing a ship from the neighborhood of a fire, where she was in apparent, though not in real danger, under a contract to pay $1,000 for the services. It was held that the contract could not be enforced, and $300 was awarded. NIXON, *J.*, said:

"Contracts of this nature, entered into in the midst of excitement, are justly regarded by the Courts with suspicion, especially when they are of such an unconscionable character. Neither the *Waite* nor the *Young America* was subjected to any peril which authorized the demand for or the agreement to pay any such sum for a service without risk, and of such short duration."

The *Young America*, 20 Fed. Rep., 926.

The case of the *R. D. Bibber*, 33 Fed. Rep., 55, decided on appeal in the Circuit Court, for this Circuit, in 1887, is not in point for the appellees. The Court in that case expressly found that the fifty per cent. stipulated in the

contract for the salvage of a vessel laden with railroad iron, where the vessel had been abandoned, was not in excess of the usual cost of salvage of a vessel with such a cargo on that coast, and that the amount was reasonable, and "does not exceed to any great extent the actual cost for work and labor to salve wrecked railroad iron." It was also found that the vessel and cargo were saved at the risk of serious damage to the property engaged in the work of salvage, one of the lighters being injured, and the crew suffering much hardship. The service was principally lighterage service.

PARDEE, Circuit Judge, distinguishing the case of the *Hesper*, 18 Fed. Rep., 672, said:

"The *Hesper* was a steamship aground in fair weather, under the control of her master and crew, who did not abandon her to salvors, and the services rendered her were at the procurement of her agents. The salvage of the *Hesper* was due as much to her machinery and her master and crew as to the services of the lighters and tugs called to her aid."

BURDEN OF PROOF AS TO AGREEMENTS.

In NEWSON on the *Law of Salvage* (p. 52) the rule as to the burden of proof is stated as follows:

"The burden of proof is on the parties alleging the salvage agreement. They must show, first, that the agreement was made, and, secondly, that it is fair and equitable. After the agreement is established, the burden will shift onto the parties disputing its validity."

In The *British Empire*, 6 Jurist, 608, the Court stated that the burden of proving the justice, as well as the fact of an agreement, is upon those who set it up.

In The *Arthur*, 6 Law Times, N. S., 556, Dr. LUSHINGTON said:

"Most clearly the onus in cases of this description lies on those who set up the agreement, and they are bound to prove the agreement was made after consideration, and was fair and equitable."

SUMMARY.

The foregoing review of the authorities suggests that the owner of property sought to be bound by an excessive salvage agreement, need not show such fraud or duress as would vitiate a contract at law, in order to have the agreement set aside in admiralty.

If circumstances are found which tend to show that a master in distress has been overreached or misled, the case becomes more simple; but where the Court clearly sees that the amount contracted to be paid is greatly in excess of what a court of admiralty would have awarded, apart from contract, it considers the inexperience of the master, his limited business capacity, his want of acquaintance with other facilities, the distress of his situation, a mistaken judgment on his part as to present or probable future peril of the property, or the improvidence of the bargain as evidence that the parties to the contract were not treating on terms of ~~equity~~ equality. Upon a finding of clear excess coupled with any one of the other elements, it will generally set the contract aside at the request of the owner, whose property is sought to be charged.

The principle which underlies these decisions is, that in any disposition which a court of admiralty may make of a case, the salvor will receive an ample and liberal compensation. The question is not, as at law, whether the recovery shall be for the contract sum or nothing; but whether it shall be for the contract sum or such sum as the Court may think fit and proper, irrespective of contract. The courts are less reluctant to disregard the contract and to award a salvage compensation, because that of itself is greatly in excess of mere payment for work, labor or material and for services actually performed. Every ordinary salvage award carries with it a bounty for the encouragement of salvors, and to stimulate their efforts to the performance of similar services in the future. To offer a salvage compensation, therefore, is not to make a niggardly offer of a diminished reward, but is to tender full payment, with a liberal bounty in addition.

REASONS FOR SETTING THE CONTRACT ASIDE.

1. *The amount stipulated for in the contract and recovered in the final decree was excessive and unreasonable as against the property charged.* Under Point I. cases have been cited and some argument adduced to show that a salvage compensation for the services actually performed would have probably amounted to about $5,000.

Without attempting to judge definitely the amount a court of admiralty would have given, it has appeared from the previous analysis of the services that the amount awarded under the contract was grossly in excess of just and full compensation, so much in excess that this Court would have reversed the decree and reduced the award, if any such sum had been given, irrespective of contract.

The *Depuy de Lome*, 13 U. S. App., 662.
The *Oxford*, 66 Fed., 590.
The *Phœnix*, 62 Fed., 487.
The *Bay of Naples*, 1 U. S. App., 47.

Courts of Appeal are loath to set aside salvage awards, which, to a large extent, rest in the discretion of the instance court. It is not an unfair inference from the authorities previously referred to that a court of admiralty should in any case set aside a contract for such unreasonableness and excess as would justify an appellate court in reducing an award.

It is argued for the appellees that in judging of the reasonableness or unreasonableness of the contract, knowledge acquired by the event must not be availed of, but that the transaction must be viewed from the position occupied by the parties when the agreement was made.

If that be the true test, it would be impossible in any case to say that a contract made at sea was unreasonable. It can never be known what weather will be met with or what accident may supervene.

It could never, of course, be known what difficulties might be met with in removing a vessel from a strand. As between the parties to the contract, such a test

might not be unfair, but it generally happens that one of the parties to it is not a party to a suit brought upon it. In a suit to charge the property of persons who were not parties to the agreement, and who might or might not have made it, had they been present, the Courts of this country, in the cases previously cited, have uniformly looked at the whole transaction in the light of the event, and have applied the test of reasonableness in that light.*

The true view to be taken of these agreements is not to view them strictly as contracts, but simply as evidence of what the award should be, to be considered in connection with other evidence, by which, if it be for an exorbitant amount, it may be overborne.

The *Agnes I. Grace*, 49 Fed., 662, 664.

The appellees claim also that the excess in the contract over and above what the Court would have allowed, is only a fair compensation for the risks they took under it, which an ordinary salvor would not take.

What are those risks? A careful examination of the contract discloses but one, namely, that they might have failed to accomplish the work in 21 days, and if they did, the master might then have awarded the contract to another contractor and thus deprived the salvors of getting back their outlay.

Taking the weather probabilities in connection with the actual situation of the vessel at the time, this risk was very trifling. Clarke certainly considered it trifling, or he never would have assented to such a term in his contract. He probably considered it trifling for another and highly sufficient reason: that there was no other salvor available, who either would or could take his place in case he failed. Moreover, it must be noticed that, as against this term in his contract, there was nothing binding Clarke to continue his exertions for twenty-one days. If he had not succeeded in floating the ship on the 17th of October there was nothing in the contract to prevent him from taking up his anchors and going away, leaving the work and the ship, without the expenditure of an additional dollar. He was not obliged, under

* cf. Roll of Alerou, ante p 43.
Tornado, ante p 51.

the contract, to incur any heavy loss, and the chances of her immediate removal were so much greater than the chances of delay beyond twenty one days that the latter can hardly be put forward as a justification for awarding three or four times the amount of a salvage reward as a compensation for that single risk.

The risk of receiving no compensation in case of failure to salve the property is one incurred by all salvors in all cases. That risk is one of the things intended to be covered by the bounty given in every case which is attended with success.

Clarke under this contract therefore took the usual risks only with the single additional risk that there was a remote possibility, but no probability, that he would be deprived of all compensation if the ship was not floated in 21 days.

The salvors' lien is always limited to the ship, whether she come off sound or damaged, and the stipulation in the contract that he was to accept her damaged, at the election of the master, in lieu of the price agreed to be paid by the contract, was only the formulation of a general rule of law, applicable to all ordinary salvage cases.

It does not appear, therefore, that the slight risk assumed by the libelants in this case, additional to the ordinary risks assumed by salvors, can fairly be set over against the great excess in the final decree over the sum with which the appellant's property justly should be charged.

2. *The parties did not stand on a footing of equality in negotiating this agreement.*

As was well said by BUTT, *J.*, in The *Rialto* [1891], Probate, 175: "In general in the case of salvage services contracted for and about to be performed the parties are on unequal terms." On the one side, we have Captain Clarke, a seasoned veteran, who had been through many salvage experiences on that coast, was perfectly well acquainted with the dangers and chances of success, and who knew from an experience of many years and extended over many cases in which he had never failed to

float a ship (fols. 416, 410, 427, 430, 490), what the real probabilities of success were. On the other side, a young and inexperienced master, 28 years of age (fol. 913), seeing his first command (fol. 756) aground, being ignorant of the locality, and having no experience by which to judge of his present danger or that reasonably to be apprehended in the future (fols. 764, 774, 775, 819, 820); his agents, upon whom he was implicitly relying for counsel (fol. 772) advising him that Clarke should have sole charge of the matter, and that it would be inexpedient and more expensive to apply elsewhere for assistance (fols. 227, 239, 802, 826, 715, 719), who ~~were~~ was sending panicy cables to his owners, based upon representations made to him by Clark that sand was banking, or was likely to bank around his ship, when, in point of fact, it was not banking, and would not around her as she then lay, but only in front of her, and between her and the shore (Hutchins, fol. 392; Coveny, fol. 388); whose judgment was, to some extent, paralyzed by his great anxiety to see the ship afloat (fol. 936). The situation of his vessel, stranded upon a sparsely settled coast, three or four miles away from a town of one thousand inhabitants, which offered no other assistance than Brock, who had no plant, was such that he did not feel justified in leaving her to inquire himself at Galveston for other assistance or relief. It is true there was cable communication between Velasco and Europe, but that ought not to inure to the advantage of respondents, if through mistake or misapprehension, or even neglect, the shipowners, 4,500 miles away, relied upon the fairness and fidelity of their agents and of the salvors.

The sum of the evidence is that there was no other assistance available to the master except that of Brock and Clarke; that Brock alone had not a sufficient plant to perform the service; that Clarke alone, in the whole region of Galveston and Velasco, had the necessary available plant (fols. 490, 512, 527) for hauling the ship off; that, although Clarke had originally offered to perform the service for what a court of admiralty would allow, which offer the master had mistakenly declined, without communicating it to his owners, and which they would have authorized had they

known of it, he afterwards positively declined to render any assistance to the ship, except upon a contract to pay $22,000 for the services; and Brock gave him a similar refusal (fols. 795, 796, 797).

The Galveston Lighterage Company, a lighterage rather than a salvage corporation, was not specially fitted, so far as appears, for the performance of salvage services to a vessel in ballast, their anchors being light (fol. 428). Whether they were or not, is unimportant, as Mr. Moller, the ship's agent, appears to have asked them if they would send tugs and appliances to Velasco to assist the ship, and, after consideration, they answered, No (fols. 489, 490).

In these circumstances, while possibly there were other alternatives, practically there are none. The master was in distress, and practically in duress. As far as he saw, the alternatives presented were to accept Clarke's terms or to leave the vessel indefinitely upon the beach.

3. *The shipowners are not estopped, by their qualified authority to the master, from asking the Court for relief.*

The cable of October 12th (fol. 570) to accept £4,580, if lower impossible, was sent by them upon a misapprehension of the vessel's position and danger, due to the master having communicated to them only partial accounts of the vessel's position on the beach, and having sent them two messages on the 11th regarding his fears of sandbanking, which were not justified by any indications then present, nor by the reasonable probabilities.

At the time these cables were received, the owners had no information of the vessel's position, except such as was contained in four messages from the master (fols. 568, 571) and one from Moller (fol. 628).

The master had not informed them that the libelants were willing at an early stage of the case, to get the *Elfrida* off the beach for a sum which an American admiralty court would allow. If they had known of this offer, they would have accepted such a mode of settlement (fols. 572, 573). They authorized the acceptance of the tender under the supposition that the services would not

be performed under any other agreement than for a specific amount (fol. 590).

They had not been informed of the vessel's draught, the depth of water she was lying in, how much greater her draught would have been with the water ballast pumped out than the depth of water under her, nor did they know anything as to the claim of sand-banking, except such as was contained in the master's telegrams (fols. 573, 574). They state unqualifiedly that if they had known that she was lying easily on a sandy bottom, head on the beach, with hardly any perceptible accumulation of sand around her, in water less than a foot shallower at one end of her than her draught would have been with her water ballast tank empty (a fact admitted in the amended libel, fol. 54), and that the weather was fine, with no immediate prospect of change, which is also admitted, they certainly would never have authorized the agreement for such a large sum (fols. 574, 581, 582). Had the master informed them of these facts, they would have appointed an agent to investigate and report (fols. 576, 577).

They admit that it was the master's duty to advise them of these matters, but add that the master did not even mention the circumstances in any of his letters (fol. 590).

The libelants have not been prejudiced in any way by the master's failure to inform his owners fully of the vessel's position before pressing them, as he did, for an acceptance of the tender. They will be amply compensated whichever way the case goes, while the owners of the property would be seriously prejudiced by having to turn over to the salvors, for not a great service, almost one-third of the gross value of their ship.

4. *There is circumstantial evidence of collusion between competing salvors.*

It has fairly appeared from libelant's evidence that the only available salvors were the libelants and Brock (fols. 490, 512, 416, 410, 427, 430, 918, 920), although Brock, it appears, had not the requisite anchors (fol. 470).

The Galveston Lighterage Company, the only other pos-

sible salvor, appears to have been otherwise engaged (fol. 490).

When the ship first grounded, Brock began to assist her, and continued to do so two or three days (p. 79), then Clark appeared upon the scene and saw the captain, who, thereupon, determined to ask for tenders. Moller, the ship's agent, evidently a friend of Clarke, had communicated with Morrissey, his agent in Velasco, who advised the captain of it, recommending that Clarke attend to the matter exclusively (fol. 237, 239). Brock on learning of this, had been telegraphing to Moller, Lloyd's agent, and to another underwriter's agent in Galveston, asking why he was shut out, and why he should not be let in (p. 240). As soon as Clarke came to Velasco, Brock appears to have ceased his efforts to obtain a contract, or to do anything for the vessel. When the tenders were received, Brock's was found to be $24,000 and Clarke's $22,000. Before the master saw Clarke, both Clarke and Brock had learned of his qualified authority to accept $22,000, if lower was impossible (fol. 799), and thereupon both refused to do any work upon the vessel for less than $22,000, and Clarke threatened to charge more, if terms were not promptly agreed to (795, 796, 797).

A very significant fact bearing upon the subject of collusion appears in the evidence. After the tenders were received, it appears that the master informed Brock of Clarke's tender and asked him if he would accept less, and that Brock refused to do so (fol. 795).

It is inconceivable that Brock, who was so eager for the work at first, should have refused to discount Clarke's bid by $500 or $1,000, unless he was already committed to Clarke.

It appeared that Brock and Clarke were both engaged on the work, and that the plant of both was used. Clarke did not state the terms on which Brock participated in performing the salvage service, although collusion between him and Brock was distinctly charged in the libel and denied in the answer.

After the vessel was floated, Brock telegraphed Clarke:

"Captain comes to Galveston, train to-morrow, *get papers, seize ship*."

Clarke practically admitted, when confronted with this telegram, that Brock had an interest in the transaction (fol. 548).

On the next day, Brock advises Clarke by telegram: "Ship seized" (fol. 739).

Moller took the stand and denied any collusion with his friend Clarke. Yet it appears that Clarke had telegraphed Moller to have Wilson, Moller's father-in-law (fol. 524), "get papers ready seize *Elfrida*" (fol. 736); and that when the libelants proceeded to examine Captain Burgess of the *Elfrida* in their own behalf, Mr. Wilson, acting as counsel, Mr. Clarke interrupted the proceedings by the statement that he had never employed Wilson to represent him (fols. 925, 125, 126); whereupon the United States Commissioner, who was taking the testimony, declared in open court that Mr. Wilson had been employed by Moller (fol. 826).

Moller also admitted that he detained the vessel at Velasco after she was free, in order to give Clarke an opportunity to seize her, and telegraphed Morrissey to that effect (fols. 522, 523), and admitted that he had promised Clarke that he would not let the ship go until he (Clarke) had got her seized (fol. 523). In other words, the agent of the ship, whose duty it was to advise and assist her, subordinated his duties to the interest of his friend.

These circumstances may fall short of absolute proof of collusion, but we submit that they at least afford some evidence of it, and have weight enough, when taken in connection with the other circumstances of the case, to justify the Court in setting the contract aside.

Last Point.

The decree of the District Court should be reversed, with costs, and a reasonable award should be made to the libelants on the basis of *quantum meruit*.

New York, April 17, 1896.

CONVERS & KIRLIN,
WILLIAM B. LOCKHART,
Proctors for Claimants, Appellants.

J. PARKER KIRLIN,
Advocate.

Supreme Court of the United States.

OCTOBER 10, 1896.

The Steamship "ELFRIDA,"
PYMAN, BELL & CO.,
Claimants-Appellants,

AGAINST

CHARLES CLARKE and ROBERT P. CLARKE,
Libelants-Appellees.*

BRIEF FOR THE "ELFRIDA," OPPOSING APPLICATION FOR CERTIORARI.

This was a cause of salvage instituted by the appellees, Clarke & Co. against the steamship *Elfrida*, in the District Court for the Eastern District of Texas, and there tried in October, 1895. The libelants obtained a decree for $22,000, with interest and costs. The claimants appealed to the Circuit Court of Appeals for the Fifth Circuit. The appeal was argued about the middle of April, 1896, before PARDEE and MCCORMICK, Circuit Judges, and SPEER, District Judge. On November 17, 1896, the Court of Appeals announced its decision, reversing the decree of the District Court and awarding to the libelants the sum of $10,000. Judge PARDEE dissented from the decision, and his dissent forms the chief ground for this application (Petition, p. 11).

* This is the title of the cause in the Circuit Court of Appeals.

The services were undertaken pursuant to a written agreement drawn up by the salvors (Rec., fols. 158, 215-216, 268, 269), and signed by Captain Burgess, of the *Elfrida*. The majority of the Circuit Court of Appeals were satisfied upon all the facts that this agreement called for a highly excessive and unreasonable compensation for the libelants' services, and that in negotiating it the parties did not stand upon an equality. Judge PARDEE was of opinion that the agreement was not unreasonable. It will be perceived, upon perusal of the opinion of the Court and of the dissenting opinion, that both agree that the so called contract is not binding upon the Court as to the amount to be awarded for the services, if found to be unreasonable and excessive; they differ solely on the view taken of the facts.

POINTS.

I.

The Circuit Court of Appeals correctly decided that the agreement between the salvors and the master was not binding upon the Court as to the amount stipulated to be paid for the services, but that the agreement was subject, as to amount, to the judgment of the Court as to its being equitable and conformable to the merits of the case.

(1.) Such has long been the doctrine laid down in the decisions of this Court.

In The *North Carolina*, 15 Peters, 40, this Court disallowed salvage as awarded by agreed arbitrators, and refused all compensation to the salvors for misconduct in attempting to obtain an undue advantage over the owners of the property. Mr. Chief Justice TANEY said: "But in "all such cases" (of agreements by the master), "unless "the acts of the master are ratified by the owners, his "conduct will be carefully watched and scrutinized by "the Court, and his contracts will not be regarded as

"*binding upon the parties concerned*, unless they *appear* "*to have been bona fide, and such as a discreet owner*, "*placed in the like circumstances, would probably have* "*made.* If he settles the amount by agreement, *those* "*who claim under it must show* that the salvage al- "lowed was reasonable and just. If he refers it to "arbitrators, those who claim the benefit of the "award must show that the proceedings were fair "and the Referees worthy of the trust. But in this case "the conduct of the captain is without excuse. The "salvage demanded was exorbitant, the danger of the "*North Carolina* was by no means imminent when she "was discovered by the *Hyder Ally;* nor did the latter "incur any hazard in going to her relief. The weather "was moderate, and she floated in a few hours."

In *Post* v. *Jones* (19 Howard, 150), this Court set aside an agreement for salvage compensation made by the master as unreasonable and excessive, and awarded a just compensation upon salvage principles.

Mr. Justice GRIER, in delivering the opinion of the Court, said: "The certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance, in saving the neighbor's property. It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, *where the salvor has not taken advantage of his power to make an unreasonable bargain;* but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumn., 210). *The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services.* We

are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

In The *Tornado*, 109 U. S., 110, this Court again declined to be bound by a salvage agreement made between the captain and salvors. The contract was set aside, at the instance of the owners of the property sought to be charged, and salvage compensation was awarded. Mr. Justice BLATCHFORD there said: "*Every agreement for "salvage compensation is subject as to amount to the "judgment of the Court as to its being equitable and con-"formable to the merits of the case* (*The Helen and "George*, Swaby, 386; *Jones on Salvage*, 94 *et seq.*)."

(2.) The most approved text books state the law upon the subject as contained in the foregoing opinions, and in the opinion of the Circuit Court of Appeals herein. Quotations from a number of the text books will be found in the appended brief used in the Court of Appeals, (pp. 43-47).

We may also quote the following passage from CONKLING'S *Admiralty*, 280: "Contracts of this nature, how-"ever, are not held obligatory by courts of admiralty "upon the owners of the property saved, *unless "it clearly appears* that no advantage was taken "of their situation, *and that the rate of compensation is "just and reasonable.* In that case the stipulated rate of "allowance will generally be adopted and enforced by the "Court as just and conscientious."

It is pointed out in the opinion of the Court that the jurisdiction of admiralty to set aside salvage agreements went back at least as far as the Roll of Oleron, in the twelfth century, while no similar jurisdiction was exercised by a court of equity until the reign of Henry VI., two and a half centuries later (1 *Spence's Eq. Jur.*, p. 624).

See also, 2 *Pollock & Maitland's History of English Law, before the Time of Edward I.*, p. 533; Story, Eq., Sec. 39, "*Early English Equity*," by Judge Holmes, 1 L. Q. Rev., 162.

(3.) The sound view laid down in many of the cases in the lower courts (see appended Brief, pp. 46 to 56), is admirably stated in the opinion of the District Judge in the case of The *Agnes I. Grace*, 2 U. S. App., 322, where it was said:

"It is true, as is insisted by the respondents' counsel, that a *contract of this character is not binding upon the Court*, and that in all cases of salvage it is *competent for the Court to adjudge and assess the amount of the recovery in accordance with the equities of the case*, and, if it should appear that a contract of this character was an inequitable one, the Court would, of course, disregard it. But, whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable *as evidence* to enable the Court to arrive at a just determination. *The Court regards this contract as evidence in that light, and not as a conclusive contract.*

Again, in one of the cases referred in the dissenting opinion of Judge PARDEE (The *Alert*, 56 Fed. Rep., 721, which, however, was a totally different case on the facts), BROWN, *J.*, stated the rule as follows:

"Where the subject of the contract is a salvage service, the Court under the law applicable to that special head of jurisdiction, *may inquire into all the circumstances of the salvage contract, including its reasonableness and fairness;* and in doing this it must take note of the fact of a mutual mistake, if that is proved to exist, and award only such compensation as justice and equity may permit. *The right and the duty of a Court of Admiralty to examine into the fairness and reasonableness of every salvage contract whenever its fairness is challenged have been repeatedly asserted by the Supreme Court; and such has been the uniform practice in this district as well as others.*"

In Judge PARDEE'S dissent no mention is made of the case of The *Jenny Lind* (Newberry, 443), decided by his distinguished predecessor in Louisiana, Judge MCCALEB. This was a stranding in the Mississippi River. An agreement had been made for the removal of the vessel and her cargo for a stated sum. Judge MCCALEB found that the amount was excessive and exorbitant, and setting the contract aside,

awarded a salvage compensation. In announcing the principles that guided his action, he said (p. 447):

"But while I am clear in the opinion that I have no power to refuse to exercise a jurisdiction, which has been so fully and unequivocally conferred, and while I am satisfied from the evidence that the services performed by the salvors in this case are of a highly meritorious character, I am yet constrained to differ very materially from the view taken by the captain of the *Hungarian* in his estimate of the value of those services. Such contracts as the one which he thought proper to execute, in favor of the libelant (Williams), will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with its own equitable discretion in filing the *quantum* of compensation. It would be absurd to call upon this Court to enforce the specific performance of such contracts. They may, and often do, form a fair and equitable criterion in awarding compensation for salvage services, if those services have been rendered under circumstances which show that the parties have voluntarily, and without any controlling necessity, on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or u on the ordinary terms of a compensation for labor and services *quantum meruerunt;* in either case it does not alter the nature of the service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. But contracts made for salvage services are not held obligatory by a court of admiralty upon the persons whose property is saved, unless the Court can clearly see that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. And it has been remarked with equal justice and elegance, that no system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive and exorbitant; that he might turn the price of safety to the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit which would outrage human feelings and disgrace human justice (*The Schooner Emulous*, 1 *Sumner*, 210."

The dissenting opinion also ignores the principle that a salvage contract will be disregarded in order to award the salvor an *increased* compensation, if the agreement is for an unreasonably small sum, as well as to diminish it if unreasonably large.

An amount in excess of their contract was awarded the salvors in the *Kingalock*, Spink's Reports, 263, 265, where the Court said: "It is not necessary, in order to vitiate an "agreement, that there should be moral fraud; it is not "necessary, in order to make it not binding, that one of "the parties should keep back any fact or circumstance of "importance, *if there should be misapprehension, accidentally or by carelessness.*"

(4.) The antiquity of this rule in the maritime law is clearly pointed out, in the opinion of the Court, by Judge SPEER.

A similar rule obtains generally in the modern maritime law. For example, the right of the Court to disregard an agreement as to amount and to award a salvage compensation is expressly conferred by the German Commercial Code, Article 743 (*Wendt's Maritime Legislation*, 3rd Ed., London, 1888, p. 751): "When during the danger an "agreement has been made as to the amount of the "salvage or payment for assistance, such agreement may, "nevertheless, be disputed on the plea that the amount "agreed upon was excessive, and the reduction of the "same to an amount more in accordance to the circum-"stances of the case may be demanded."

In a recent article upon the Scandinavian Code, contributed by Dr. Raikes to the *Law Magazine and Review* (Vol. 21, 4th series, p. 132), he shows that Article 27 thereof provides:

"If whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may within two months after the agreement bring the question of amount before the Court, which can reduce the amount agreed on if it is considerably in excess of a reasonable payment for the *service performed.*

"If it is agreed that the amount shall be settled by arbitration, or in other similar way, the person liable to pay may repudiate the agreement if he does so within 14 days."

The author further says:

"The Swedish version originally gave six months in which to move to set aside the agreement, and declared agreements to arbitrate the amount invalid. This was amended as from 1st July, 1894, and now runs as follows:

"'If whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may, nevertheless, have it reduced by legal process when the agreed sum is considerably in excess of what is fair. If the money has been paid whilst the danger existed the proceedings must be taken within six months from the date of payment, or they will be barred. If the agreement is that the amount of salvage shall be settled by arbitration or in any such way, it does not bind the person liable to pay the salvage if he gives notice of his repudiation of the agreement to the salvors within a fortnight of the day in which it was made.'

"The Norwegian version has 14 days as the limit of time in both clauses."

II.

The Circuit Court of Appeals rightly held that the agreement was for an unreasonable and excessive compensation, which would not have been agreed to by the owners of the vessel if they had been fully informed of the facts.

There is nothing to add to the conclusions stated in the opinion of the Court upon this point. The questions of unreasonableness and of excess are essentially questions of fact, which cannot be passed upon by the Court without study of the entire record. If, upon an application for a writ of *certiorari*, the Court will consider this question of fact, then we respectfully beg reference to the appended brief used in the Circuit Court of Appeals, in which all questions of fact will be found fully dealt with, and to the record.

At page 30 of the brief will be found a comparison between the services performed for the *Elfrida* and those

performed for the steamship *Hesper*, stranded a few years before, off Galveston, where Judge PARDEE, for larger services performed for a vessel and her cargo of far greater value, reversed a decree of the District Court, and reduced an award from $8,000 to $4,200.

The essential facts in regary to the services performed for the *Elfrida* are that during the 13th and 14th of October, after the libelants, Clarke & Co., had learned through the charterer of the ship, that the master would make an agreement for $22,000, the libelants hired a forty-five foot schooner, of fifteen tons burden (fols. 475, 476), upon which they loaded some anchors, cables and provisions, in Galveston (fols. 473, 474). These they took to Velasco, about forty miles away, in tow of the tug *Josephine*, on the 14th (fol. 187). The salvage agreement between the master and Clarke & Co. was signed on the 15th, after the arrival of the expedition at Velasco (fol. 159). Before signing the agreement, and after arrival in Velasco, on the 14th, the libelants arranged for a lighter with Brock, who had formerly been a competing salvor. This was testified in Clarke's examination (fol. 161): "Q. When did you hire the lighter from "Brock? A. It was the day I arrived there, the 14th, I "think, *before the contract was signed.*" On the 16th, by the aid of Brock's barge, two of the libelant's anchors were planted seaward, on the steamer's port quarter, and two of the *Elfrida's* anchors were planted on her starboard quarter, all about 1,540 feet astern of the vessel (fols. 56, 62). Cables, supplied by the salvors, were carried to the steamer's anchor cables, attached to her anchors, and to Clark's own anchors, the *ends of the cables being brought aboard the steamer and attached to her steam winches*, which were located on deck. Two winches were attached to each rope, so that the *four winches were brought to bear on the two heavy cables* that went out to the anchors astern. A rope from an anchor on the starboard side were carried to the steamer's windlass forward (Rec., 56, 57, 110, 291). The steamer's tanks were then pumped out, so as to lighten her draft (330-331). All these arrangements were perfected during the 16th and 17th, prior

to three o'clock (fol. 900). The salvors then directed the master to get up steam, both for the main engines and for the steam winches, which are small hoisting engines situated on deck; and thereupon the *steamer began to haul herself off the beach under her own steam alone, not even a tugboat assisting in the pulling* (fols. 900, 170, 171, 172, 873, 875, 881, 895). She started almost immediately after strain was put upon the rope, and went along with slight jerks and bumps until she was afloat (fols. 907, 901, 874). When first afloat, owing to the failure to place any anchor on her port side, an easterly current bore her over against the submerged jetty. About an hour or two were consumed in getting her away from the jetty (fol. 174). She was finally afloat in clear water, and proceeded to sea under her own steam at 7.30 P. M. (fols. 950-960), in about *four hours from the time the winches and propeller were put in motion to haul her off the beach.*

The value of the property employed by the salvors was not attempted to be shown by any competent evidence.

Libelant Clarke did not touch the subject at all, though twice examined. There are vague statements at different places in the testimony that a plant of considerable value was in use, but no definite information as to its value appeared to be obtainable. It was suggested that two tug boats and two schooners, with a large number of anchors and cables, had been used, but upon cross-examination of Captain Clarke, it appeared that only one tug and one schooner were used (fol. 187), with Captain Brock's barge. The value of the tug was not shown; moreover the tug was not used, except to free the vessel when she touched the jetty, after being carried over against it by the current, owing to the absence of any anchor on the port side. The steamer was then in deep water, and the touching upon the jetty was evidently a trifling matter. The schooner did not belong to Clarke, but was only chartered to take the anchors down from Galveston to Velasco. The agreement of charter was $35, but $100 was paid (fol. 476). Brock's barge is said to have been worth about $6,500, but there is no suggestion that it was actually in any peril (fol. 164). Some of the wit-

nesses testified that a large number of men, as many as 25 or 30, were taken down from Galveston, but Clarke himself admits that 15 or 16 all told was about the number (fols. 156, 157). The number of anchors was not clearly shown, nor was any attempt made to state their value, nor that of the cables.

Judge PARDEE'S conclusion that the salvors' property engaged in this work was worth $50,000 is merely a surmise. The salvors' outlay was not proved, but, from the facts shown, could not have been great.

The owners testify they would not have sanctioned the agreement, if they had known all the facts (Brief, *post*, pp. 62, 63).

III.

The petition for this writ and the dissenting opinion of Judge Pardee contain a number of errors to which attention should be called.

It is not intended to discuss at length the different conclusions arrived at in the opinion of the Court and in the dissenting opinion. Such an inquiry would involve in effect a retrial of the cause upon this application.

(1.) Judge PARDEE finds that the *Elfrida* was aground "within the limits of the port of Galveston," the intimation being that she was at a place where assistance would have been readily available. While, perhaps, Velasco may be within the customs limits of the port of Galveston, it is about *forty miles away;* and the proof was uncontradicted that there were no salvors, even in Galveston, who could float the ship, except the libelants and a competing salvor named Brock, and they could only do it by combining their forces (fols. 512, 527, 490, 918, 924). Both had tugboats (fols. 187, 188). Clarke had heavy anchors, but no lighters from or by which they could be planted (fol. 161), while Brock had lighters, but no anchors (fol. 470). It was necessary, therefore, that both

should join in the salvage operation, as the event showed (fols. 161, 548, 919).

(2.) The Judge also found that the vessel was "in water "from 6 to 8 feet in depth, according to the tides." The amended libel, filed after the proofs were nearly all completed, expressly admitted that the vessel lay in *9 feet* of water at the highest tides (fol. 54).

(3.) He further finds that she was imbedded in the sand about two feet. But the evidence showed that the sand was quick at this point: that the vessel settled in it to her usual draft when afloat (fol. 391) and moved or rocked, where she lay, except when the water was very smooth (fol. 451).

(4.) He also found that the steamer's draft was "eleven "feet ten inches, which could not be reduced by discharge "of ballast or otherwise so as to get heroff." The record shows that the bottom was almost flat at this point; and that while the draft was eleven feet *six* (not ten) aft (fol. 804), it was only *nine* feet forward (fol. 912); and that her draft *could be reduced eighteen inches by pumping out her water ballast* (fol. 916). The majority opinion finds that the vessel must have been very nearly afloat when her ballast was pumped out: and this is also confirmed by the readiness with which she moved when the steam power was first put on the winches.

(5.) In the dissenting opinion stress is also laid upon the fact that the master was in communication "with the *agents* of the ship;" and in the petition (p. 9) he is referred to as "surrounded by his friends and those "whose interests were the vessel's interest." The only "agency" that Moller & Co., to whom reference is thus made, occupied was by virtue of a charter of the steamer to them, in which there was a provision that they should be permitted to act as agents of the vessel in transacting the ship's business, *under the charter-party*. In point of fact, the ship had *no agents* at all in the United States, except the master, as the ship had not arrived in port and had never entered upon the charter-party, and Moller's agency had never attached. The evidence leaves no doubt that

Moller, who was a friend of Clarke, and father-in-law of one of the counsel engaged in the case, acted from first to last in the interest of Clarke instead of in that of the ship. He testified for libelants on the trial. On learning of the stranding he at once recommended Clarke to the master as a "very *practical* wrecker" (fol. 715); and Moller's local representative at Velasco urged his appointment upon the master (fols. 237, 239). Moller subsequently intervened to prevent the employment of Brock (fols. 242, 244). As soon the ship was off Clarke telegraphed to have Moller's father-in-law, Mr. Wilson, "get papers ready, seize *Elfrida*" (fols. 736, 524). Moller admitted that he detained the vessel at Velasco, after she was free, to give Clarke an opportunity to seize her, and telegraphed his representative there to that effect (fols. 522, 523). He further testified that he had promised Clarke that he wouldn't let the ship go until he (Clarke) had got her seized (fol. 523). It is impossible to regard a man working from start to finish in the interest of his friends, the salvors, as an *agent*, in any real sense, of the owners of the ship.

(6.) In the dissenting opinion stress is also laid upon the offer of the salvors to the captain to undertake the floating of the *Elfrida* for such salvage compensation as the Court might warrant. This is dealt with in the majority opinion, where it is pointed out that, although this offer was, *at first*, made, the owners had no knowledge of it, had no chance to accept it, and that *afterwards the salvors not only declined to work unless they had a contract for* $22,000, but were exceedingly urgent for an immediate acceptance of an agreement on that basis, under threats of requiring a larger sum unless the contract was made.

(7.) In allusion to the salvors' preparations for the service, and to the plant and vessels they had employed therein, Judge PARDEE refers to the evidence of large preparations and large numbers of boats and lighters stated in the direct examinations. On cross-examination, however, it was shown that there were, in fact, one tugboat, but one schooner and one lighter, three anchors, and a total of about fifteen men, employed on the service, as is pointed out in the majority opinion.

(8.) The valuation placed upon the property of the salvors engaged in this enterprise, as stated by the Judge at $50,000, is merely a surmise, unsupported by the proofs.

(9.) The learned Judge also exaggerates the value of the *Elfrida*. The evidence of the only witness who was qualified to express any opinion upon this point shows that her value did not exceed $70,000, as found in the majority opinion. The amount of the salvage decreed therefor in the District Court, instead of being "twenty or twenty-five per cent. of the salvage property," was *over thirty-one per cent.*

(10). It was on the assumption that the award did not exceed twenty or twenty-five per cent. that Judge PARDEE said, "I am clearly of opinion that the amount agreed "upon is not *excessive to such an extent* as to be unrea-"sonable." He felt it was excessive in some degree. If he had correctly found the value of the vessel at $70,000, and the percentage at above thirty-one per cent., he would probably have found it "excessive *to such an extent*" as to be unreasonable.

(11.) The Judge who decided this case in the District Court was greatly pressed for time, owing to the large criminal calendar which was awaiting his attention. He therefore took no time for consideration. The whole of the claimant's testimony except that of the pilot was taken out of Court, so that he had no opportunity of seeing those witnesses. He had no briefs and he took no time to consult authorities. His decision was rendered immediately upon the close of the arguments, and is therefore not justly entitled to the weight which it should receive if it had been rendered under the ordinary circumstances.

(12.) The cable sent by the owners to the master, authorizing him to accept tender of 4,580 pounds if lower was impossible, which Judge PARDEE refers to as an express authorization from the owners of this agreement, was sent by them upon a misapprehension of the vessel's posi-

tion and danger, owing to the master having communicated to them only partial accounts of her situation, and having sent them two messages on the previous day regarding his fears of sand-banking, which were not justified by any indications then present, nor by the reasonable probabilities (fols. 799, 813, 814). At the time they sent the cable referred to they had no information of the vessel's position, except as was contained in four messages from the master (fols. 568, 571), and one from Moller (fol. 628). The master had not informed them that the libelants had once offered to salve the vessel for a sum which an admiralty court would allow. If they had known of this offer they would have accepted it (fols. 572, 573). They authorized the acceptance of the tender under the supposition that the services would not be performed under any other agreement than for a specific amount (fol. 590).

They had not been informed of the vessel's draught, the depth of water she was lying in, how much greater her draught would have been with the water ballast pumped out than the depth of water under her, nor did they know anything as to the claim of sand-banking, except such as was contained in the master's telegrams (fols. 573, 574). They state unqualifiedly that if they had known that she was lying easily on a sandy bottom, head on the beach, with hardly any perceptible accumulation of sand around her, in water less than a foot shallower at one end of her than her draught would have been with her water ballast tank empty (a fact admitted in the amended libel, fol. 54), and that the weather was fine, with no immediate prospect of change, which is also admitted, they certainly would never have authorized the agreement for such a large sum (fols. 574, 581, 582). Had the master informed them of these facts they would have appointed an agent to investigate and report (fols. 576, 577).

They admit that it was the master's duty to advise them of these matters, but add that the master did not even mention the circumstances in any of his letters (fol. 590).

The libelants have not been prejudiced in any way by the master's failure to inform his owners fully of the vessel's position before pressing them, as he did, for an ac-

ceptance of the tender. They will be amply compensated however the case goes, while the owners of the property would be seriously prejudiced by having to turn over to the salvors, for not a great service, almost one-third of the gross value of their ship.

(13.) Notwithstanding the learned Judge found that the charges made by the claimant as to collusion and false representation by the salvors was wholly unsupported by proof, there was very strong circumstantial evidence of collusion disclosed by the record (see appended Brief, pp. 63-65); and there was express testimony of false representations of the danger of sand banking around the vessel (*Idem*, p. 7), which libelant Clarke, although twice examined, did not deny.

(14.) The cases referred to in the dissenting opinion, if read in the light of their special facts, do not support the conclusions for which they are cited as authority.

In the case of The *Agnes I. Grace*, 49 Fed. Rep , 662, it was expressly found in the District Court that the amount stated in the agreement *was a reasonable and just compensation for the services actually performed;* and, although the Court of Appeals thought the amount a trifle high, they nevertheless affirmed the decree upon an express finding that "this Court *does not deem it suf-* "*ficiently unreasonable* to disturb the *judgment of the* "*Court below.*"

The remarks of Mr. Justice STORY, in *Bearse* v. *Pigs of Copper*, 1 Story, 323, which are quoted, while no doubt correct as an abstract proposition, should be read in connection with his remarks upon a case of excessive contract in The *Emulous*, 1 Sumner, 207, where he said that "no system of jurisprudence, founded upon moral or "religious, or even rational principles, could tolerate "for a moment the doctrine that a salvor might avail "himself of the calamaties of others to force upon them "a contract unjust, oppressive and exorbitant." Moreover, the quotation made in the case of the *Pigs of Copper* had no bearing upon the case there in hand, as in the next sentence Judge STORY said, "Now, with respect to the

" salvage service here in controversy, *there is not, in my* " *judgment, any ground to assert that any fixed or definite* " *contract,* for the service existed between the parties."

The case of The *Alert*, 56 Fed. Rep., 724, from which a quotation is taken, was one in which the facts were totally different, the contract there in question having been made between salvors and agents of owners in New York City, for a salvage expedition to go to the relief of a vessel and cargo stranded on the coast of South America. The amount specified was found not to be unreasonable to cover the great outlay required and the services actually performed.

The *Silver Spray*, Brown's *Admiralty*, 354, was a case where the Court declined to give the salvors a larger compensation than the amount specified in their agreement. This case is opposed in principle to the *Kingaloch*, Spink's Rep., 263.

The remarks quoted from the opinion of Judge HUGHES in the case of the *Sir William Armstrong*, 53 Fed. Rep., 150, are contrary to the decision of this Court in *Post* v. *Jones*, 19 Howard, 150, and the *Tornado*, 109 U. S., 110.

It is well known that the tendency in the eastern district of Virginia is to award very large sums for salvage. The Court of Appeals of that Circuit on more than one occasion has diminished these awards (*e. g.*, the *Phœnix*, 62 Fed. Rep., 487, where $15,000 was taken off an award).

In the case of the *H. D. Bacon*, Newberry, 280, Judge WELLES, whose opinion is quoted, stated on page 279 that the weight of authority was to the contrary, and concluded his decision with an *express finding that the amount stipulated in the agreement was just and reasonable for the service actually performed.*

The passages quoted from the decision of Judge SPEER in the *Agnes I. Grace*, 41 Fed. Rep., 664, and from *Jones on salvage*, p. 99, really sustain the conclusion arrived at in the majority opinion, rather than those for which they are cited.

IV.

The case is not one of such gravity or importance as to justify an allowance of the writ.

The controversy is essentially one of fact, not of law; and, as the case now stands on the decision of the Circuit Court of Appeals, the salvors will receive a very large compensation for their services, and in addition thereto, a sum sufficient to indemnify them against all their expenses of litigation. These expenses, it should be remembered, were needlessly incurred, as the plaintiffs admitted in their answer that they were liable to pay for a salvage service, and offered to submit to a decree for a salvage compensation (fol. 89).

Owing to the short notice received of this intended application, an insufficient time is afforded for the preparation of a full brief in opposition to this application. The appelants, therefore, ask reference to their brief in the Circuit Court of Appeals, hereto appended, for further arguments upon various points discussed in the opinion of the Court and in the dissenting opinion.

NEW YORK, February 11, 1897.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimants of the "Elfrida," Appellants.

J. PARKER KIRLIN,
Of Counsel.

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Supreme Court of the United States,

October Term, 1898.

CHARLES CLARKE and ROBERT P. CLARKE, Petitioners, Appellants, AGAINST The Steamship ELFRIDA, Pyman, Bell & Co., Claimants, Appellees.	No. 60.

BRIEF FOR CLAIMANTS, APPELLEES.

Statement.

This cause is before the Court by virtue of a writ of *certiorari* issued to the United States Circuit Court of Appeals for the Fifth Circuit, March 11, 1897 (Rec., p. 280). The libel was filed in the Eastern District of Texas, October 24, 1894. It claimed the sum of $22,000 for salvage services rendered to the steamer under an alleged contract (p. 8). The claimants defended on the ground that the contract was inequitable; that it stipulated for an excessive and unreasonable compensation for the services, and that it was obtained from the captain by compulsion and by unfair means (pp. 17-19, 20 28). The captain himself verified the first amended answer, alleging these defenses (p. 20).

The cause was heard at Galveston before Honorable David E. Bryant, Judge for the Eastern District of Texas, who gave his decision at the conclusion of the argument, without taking time for consideration, and without having briefs. No opinion was delivered in the District Court.

The findings of the District Judge are recorded in the decree as follows (p. 254):

"The Court finds from the evidence that the services rendered by the libelants in saving the steamer Elfrida, her tackle, apparel and furniture, were and are salvage services, and are entitled to be paid for and compensated as and for salvage services.

"The Court further finds from the evidence that the said salvage services were rendered by the libelants in saving the said steamship, her tackle, &c., under a contract in writing, made between the libelants and Benjamin Burgess, the master of the said steamship Elfrida, in possession of said steamship at the time, and, as such master, was duly authorized to make the same; and the Court further finds from the evidence that said contract was a lawful contract, and that the same was entered into by the master of the said steamship with full knowledge or means of knowledge of said master and of the owners of said steamship, of all the conditions then existing, and that the amount named in said contract was not unreasonable under the said conditions."

It will be noticed that he made no finding as to the reasonableness of the amount agreed upon for the services rendered.

From this decree, the claimants appealed to the Court of Appeals for the Fifth Circuit, where the decree below was reversed.

The Court of Appeals found that the contract was inequitable; that it provided for an unreasonable and excessive compensation for the services performed; that in the negotiations for and the making of the contract, the parties did not stand on an equal footing, and that, accordingly, it should be set aside, and a salvage compensation awarded to the libelants in the sum of $10,000 (Opinion, pp. 264–274).

Judge Pardee dissented from the decision of the Court (p. 274).

After an application for a rehearing in the Court of Appeals had been made and denied (pp. 261–264), the libelants sued out this writ.

Facts.

The salvage services were rendered under the following circumstances:

On Friday, October 5, 1894, the Elfrida, a steel steamship of 1,454 tons net register, 290 feet long, bound inward, in ballast, for the port of Velasco, Texas, grounded on the bar between the jetties which extend from the right and left banks of the river, about a mile into the gulf.

Her draft was 9 feet forward (Boylen, 237), and 11 feet 6 inches (Burgess, 207), or 11 feet 10 inches aft (Coveney, 90).

During the 5th and 6th of October unsuccessful efforts were made to haul her off with a kedge anchor, and by backing the engine, but her position continued the same until the night of October 6th (pp. 83, 245), when the sea rose, carrying her over the submerged outer end of the jetty, and some distance further shoreward on the beach (pp. 83, 84). Her positions on the bar and afterwards on the beach are shown in the captain's diagram (p. 322; explained 237).

The position in which she brought up on the night of the 6th was a cable's length to the west of the west jetty (p. 234). That part of the jetty which was above high water projected seaward beyond her stern (p. 112), and sheltered her from easterly winds (pp. 75, 89). She lay parallel with the jetty (p. 114) about four or five hundred feet from the beach head on to it (p. 196), and about a thousand feet from water of sufficient depth to float her (p. 196; amended Libel, p. 12). The shore at this point is very flat (pp. 96, 99). The bottom consists of a layer of quicksand about ten feet deep, with underlying blue clay (p. 101). The steamer settled in the quicksand to her normal draft (p. 101), rocking and moving in it whenever there was a slight sea (p. 118). She lay in 9 feet of water at high tide

(pp. 225, 208; Ex. 16, p. 184; Ex. 30, p. 167; Amd. Libel., p. 12).

The pilot, Coveney, sounded around the vessel just before she came off on October 17th, and found nine feet of water at her stern, and seven at her bow:

"Q. What water was there around her where she was stranded, before they began to move her? A. Seven feet and nine inches aft. I sounded it at the time. On top of high water, it was a 3.2 tide."

The answer was erroneously transcribed. What the witness said was, "Seven feet *forward*, nine *feet* aft." The answer was so understood by both counsel, as appears from the following questions asked immediately afterwards during his examination:

"By Mr. Kirlin (p. 87): Q. You say the steamer had 7 feet and 9 feet of water at the time she began to move. What was her draft then? A. 9 feet 6 inches aft and 9 feet forward."

"By Mr. Stubbs (p. 89): Q. You spoke of having sounded on the beach, and found 4 feet forward and 6 feet aft. That was on the 9th; *and when she was taken off* (17th), *it was 7 feet forward and 9 feet aft.* Then you spoke of a 3-foot tide; was that an unusually high tide? A. Yes, sir."

The lightening of the steamer's draft, here referred to, is accounted for by the discharge of the water ballast.

It was ascertained, therefore, by soundings and observations, that her draft aft was 9 feet 6 inches, and the depth of water aft was 9 feet; that her draft forward was 9 feet, and her depth of water forward was 7 feet. She lay in the sand 6 inches aft, and two feet forward.

There was no exceptionally rough weather while the ship was ashore (pp. 234, 235, 236, 241, 225, 226, 228, 242, 244; Report, p. 253). It was fine during the time of the service, and continued so indefinitely thereafter.

On October 14th, as the libelant testifies, he learned from the character of the vessel, and from Lloyd's agent, that his tender for the work was accepted (p. 35). He at once hired the schooner *Louis Dolsen* (p. 36) of 15 tons, 45 feet long, for which he paid $100 (p. 125), to take his

plant to Galveston in tow of his tug *Josephine* (p. 36). He took with him about twelve men (p. 36).

The expedition arrived at Velasco on the same day, or on the 15th (p. 36). On arrival at Velasco, Clarke engaged a derrick lighter for use in laying the anchors (p. 37).

The agreement between the captain and the salvors was signed on the 15th (p. 31). On the 16th and 17th, the salvors were at work planting the anchors and connecting cables from them to the winches of the ship. In this work, both Clarke and the mate of the ship agreed that only *one* tugboat and *one* lighter were employed (Scott, p. 226; Clarke, p. 45). Two anchors weighing about seven thousand pounds each, the property of Clarke, were carried about fifteen hundred feet away on the starboard or east quarter of the ship (p. 45), and two anchors weighing about three thousand pounds each, the property of the *Elfrida*, were placed a similar distance away on the south or port quarter (p. 39). The cables connected with these anchors were carried around the ship's steam winches. Another anchor, apparently the property of Clarke (who had three in the service; Scott, p. 226), was laid off the starboard side, attached to a cable which was brought to the ship's windlass over the starboard bow (p. 225). The work of laying the anchors and connecting the cables attached to them, with the steam winches and windlass, was completed about 3.30 o'clock on October 17th, and the water ballast, at the direction of the salvors, had been pumped out. The *Elfrida's* engines, winches and windlass were then started by her own steam, and in less than a half hour she began to move herself off. She went slowly for the distance of about a thousand feet, when she floated clear, but was carried by the current against the west jetty. Clarke's tug, the *Josephine*, then, for the first time, took hold of her, and towed her away from the jetty. At 7.40 P. M., of October 17th, four hours after the work of hauling her off was begun, she was free and clear of everything, and put out to sea, under the control of the pilot.

Subsequent examination of her bottom in the dry dock at Newport News, showed that she was wholly uninjured,

except for a slight indentation, about a foot long in the bilge, which was probably caused by contact with the jetty.

The value of the vessel at the time of the stranding was $70,000 (Bell, p. 148).

The evidence in connection with the making of the salvage agreement is stated under Point V.

POINTS.

I.

The Court of Appeals had the right and was bound to consider the merits of the services performed, in judging of the reasonableness or excess of the sum stipulated for in the agreement, and might have set the agreement aside for excess alone.

The differences of opinion in the Court of Appeals centred mainly in the question whether, in determining the reasonableness of the agreement, the Court was justified in regarding the facts and circumstances of the services and the result achieved, or whether it was limited to a consideration of the position of the parties and the situation of the property, as they existed at the time the agreement was made.

The dissenting opinion of Judge Pardee proceeds upon the theory that a Court of Admiralty is bound, like a Court of Law, to the letter and figure of an agreement, and that notwithstanding the amount stipulated for compensation might be excessive for the services actually performed, it must be enforced, unless inequitable in its inception.

The opinion of the majority, on the other hand, holds that a Court of Admiralty is not bound to decree the specific performance of a contract for salvage, unless it can sanction its terms as equitable and conformable to the actual merits of the case.

It seems to be conceded in both of the opinions in the Court of Appeals, and is admitted in the appellants' brief here, that $22,000 *is* excessive for what the salvors did.

Judge Pardee was of opinion "that the amount agreed upon *is not excessive to any such extent* as to be unreasonable" (p. 276), and that excess alone was not enough to vitiate the agreement; and as he found no other ground for setting it aside, he favored a decree for specific performance.

The decision of the majority, announced by Judge Speer, held that the agreement was exorbitant for the work done, and that this was a sufficient reason for declining to sanction it (p. 270); but it also found that the parties did not deal on an equal footing in reaching the agreement (p. 272), and hence, on both grounds, it reversed the decree below, and awarded to the salvors the sum of $10,000, as a reasonable compensation for their services.

The brief of the appellants here does not seem to question the conclusion that the proposed award of $10,000 *would* afford them ample compensation, or that the amount stipulated for was in some degree excessive.

It is proposed to contend in this brief that an agreement to pay a certain sum for salvage services is not binding upon the property salved, nor upon a Court of Admiralty, unless it can be sanctioned as a fair and just compensation for the services actually performed; that the jurisdiction of admiralty to set aside such agreements for exorbitancy is an ancient and original jurisdiction in the Court, exercised long before a similar jurisdiction existed in courts of equity; and that, in the admiralty practice, an agreement for a specific amount is looked upon as evidence only of what the parties at the outset may have thought would be proper, but is not conclusive upon the judicial discretion in filling the *quantum* of compensation.

(1.) Origin of the jurisdiction.

The practice of setting aside agreements for salvage services, upon the ground of excess, extends very far back in the history of the law.

In *The Roll of Oleron*, Art. 4 (2 Black Book of the Admiralty, ed. Twiss, p. 437), a compilation of maritime judgments made near the end of the twelfth century, this rule is laid down:

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the peryll that they be in, the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the marchauntes shall have made, rewarde them. This is the judgment."

Judge Peters, in the *Ship Catharina*, 1 Peters Adm., 104, 107–108, gives this account of the origin of the Laws of Oleron:

"The laws of Oleron occupy now a portion of the famous Black Book of the British Admiralty, which is consulted by all their courts on subjects of maritime and commercial controversy. These laws of Oleron were not entirely of British growth. They were compiled at first, as French authors assert, and from the face of them it would seem probable, by Queen Eleanora, Duchess of Guienne, for her continental dominions, and afterwards improved and enlarged by her son, Richard the First, of England, in no small degree from the maritime laws and customs, not only of his own country, but also from the laws and customs prevailing among the continental trading nations. Of these, the Saxons were, at an early period, the most conspicuous and practically intelligent in nautical affairs. They introduced into England their maritime knowledge, as they did some valuable principles of the common law. What was entitled the Saxon shore extended from the western parts of Denmark to the western parts of France. The excellence and importance of these laws of Oleron are evinced by a contest for their origin between two great nations, who have wisdom and liberality enough to follow them, be the fact of origin how it may."

A similar account is given of their origin, in 1 *Azuni's Maritime Law*, Ch. 10, Art. 10, pp. 377, 381, where it is said that the Roll was first published by Queen Eleanora, Duchess of Guienne, about 1150, and was introduced into

England by Richard I., some time between that date and 1200. To the same effect 21 *Encyclopedia Britannica* (9th Ed.), *Article, Sea Laws*, pp. 583, 584.

It does not appear that contracts and other instruments were canceled by the Courts of Chancery, before the reign of Henry the Sixth, two centuries and a half after the Roll of Oleron was made a part of the law of England in the reign of Richard the First (*Spence, Equitable Jurisdiction of the Court of Chancery* (Phila., 1846), p. 624; 2 *Pollock & Maitland's History of English Law Before Edward I.*, p. 538, *Story, Eq.*, Sec. 39; "*Early English Equity*," by Judge Holmes, 1 L. Q. Rev., 162).

The rule laid down in the Roll of Oleron has survived in the codes or in the common law of all the maritime countries of Europe. Some have expressly enacted similar provisions in their codes, while others follow the principle in their jurisprudence, as a part of the ancient law of the sea.

(2.) THE CONTINENTAL DOCTRINE.

The German Commercial Code, Art. 743, provides:

"When during the danger an agreement has been made as to the amount of the salvage or payment for assistance, such agreement may, nevertheless, be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance to the circumstances of the case may be demanded."

Wendt. Maritime Legislation (3rd Ed.), 751.

In a recent article upon the Scandinavian code, contributed by Dr. Raikes to the *Law Magazine and Review* (Vol. 21, 4th Series, p. 132), Article 27 thereof is translated as follows:

"If, whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may within two months after the agreement bring the question of amount before the court, which can reduce the amount agreed on if it is considerably in excess of a reasonable payment for the *service performed*,

"If it is agreed that the amount shall be settled by arbitration, or in other similar way, the person liable to pay may repudiate the agreement if he does so within 14 days."

The author further says:

"The Swedish version originally gave six months in which to move to set aside the agreement, and declared agreements to arbitrate the amount invalid. This was amended as from 1st July, 1894, and now runs as follows:

"'If whilst the vessel was in distress a commander or owner of ship or cargo has made a salvage agreement, the person liable to pay on the agreement may, nevertheless, have it reduced by legal process when the agreed sum is considerably in excess of what is fair. If the money has been paid whilst the danger existed the proceedings must be taken within six months from the date of payment, or they will be barred. If the agreement is that the amount of salvage shall be settled by arbitration or in any such way, it does not bind the person liable to pay the salvage if he gives notice of his repudiation of the agreement to the salvors within a fortnight of the day in which it was made.'

"The Norwegian version has 14 days as the limit of time in both clauses."

Art. 166 of the Maritime Code of Finland provides:

"If at the time of the accident the owner of the ship or of the goods has accepted assistance on conditions too onerous, the contract is void; the Court examines and then fixes itself the amount to be paid" (3 R. I. D. M., 74).

Art. 568 of the Commercial Code of Holland provides:

"Every agreement or transaction concerning the price of assistance or of salvage may be modified or annulled by the Judge if it has been made in the open sea *or at the time of stranding*. Nevertheless, when the danger is past it shall be lawful for both to make regulations or agreements as to the price of assistance or of salvage" (3 R. I. D. M., 374; The *Schiedam*, 48 F. 923).

Under Art. 127 of the Italian code the contract is not binding if it was made at sea or at the time of the disaster.

Ghiones v. *Demythiener*, 3 R. I. D. M., 766.

The jurisprudence of other European countries is to the same effect as the provisions of the codes just quoted: *France*, Court of Cassation, 3 R. I. D. M., 15; 5 do. 486; 9 R. I. D. M., 185; *Belgium*, 3 R. I. D. M., 334 (a stranding); *Greece*, 10 R. I. D. M., 476; and *Denmark*, 5 R. I. D. M., 406.

Further discussion on the subject may be found in a valuable article entitled "*A Resume of the Principles Prevailing on the Subject of Salvage and Assistance in the Legislation and Jurisprudence of the Principal Countries*," by M. Giambattista Benfante, in 5 R. I. D. M., 564.

In the *Navire Garibaldi*, 13 R. I. D. M., 94, decided by the Tribunal of Commerce of Saint Nazaire, a contract for salvage services to be performed to a steamship stranded in the Bay of Saint Nazaire for 2,000 francs was set aside upon the ground that the captain consented to the sum stipulated in the fear that his vessel would be lost, and that the price agreed upon was an exorbitant sum for the services. The Court awarded 500 francs.

In the *Navire Titian*, 9 R. I. D. M., 185, where a vessel was stranded and a tug declined assistance except upon agreed terms, the Court of Appeal of Aix held that the captain of the tug "imposed conditions extremely rigorous and out of proportion to the expenses which he would incur and the risks he would have to run," and annulled the contract.

M. Autran, the editor of the review, adds a note, commenting on that case as follows:

"The French law contains no special provision regarding the validity of contracts for salvage made at sea; the question of sustaining or annulling them is rather a question of fact than of law. The foreign law is generally favorable to the rescission of such agreements."

The Belgian Government, on the occasion of the International Exposition at Antwerp, in 1885 proposed an International Congress of commercial law, having for its object the unification of legislation, in matters of contracts of transportation, bills of exchange, and of maritime law. Eighteen governments responded to the invitation, as well as a large number of jurists, professors

of law, commercial associations, representatives of legal journals, &c. Their deliberations covered ten topics. On the subject of "Assistance and Salvage," resolution No. 44 provided:

"Payment for assistance or for salvage shall be determined upon consideration of the following circumstances: The skill shown, the time consumed, the service rendered to the ship, to persons and to property, the expense outlayed, the number of persons actively engaged, the danger to which those persons have been exposed, the danger that threatened the ship, the persons and the property saved, and finally, the value of the property saved, deduction being made for expenses. Passengers whose lives have been saved need not contribute to the sum awarded for assistance. *Every contract made while the danger continues is subject to rescision.*"

M. Autran's Report of the Proceedings of the Congress, 1 R. I. D. M., 425.

The Congress of Maritime Law at Genoa, in 1892-3, adopted the same principle in these words:

"Such agreements, in case of exaggeration, are subject to reduction" (8 R. I. D. M., 181).

It may be objected that the foreign codes and jurisprudence are not binding here, except so far as their principles have been adopted into our law. No doubt this is so. They are not cited as being in any sense binding, but only as an argument supporting our contention as to what the true rule should be. To the objection that they are not a part of our law, the answer of Judge Peters in the *Ship Catharina*, 1 Pet. Adm., 104, 110, may be given:

"I shall not contend with those who say, we ought to have a maritime code of our own, about the binding force of all these laws on us. By the general laws of nations, we certainly are bound. These apply most frequently in the Prize Court; but there are many cases of *salvage*, wreck, &c., on the instance or civil side of the Court, which necessarily must be determined under the general law. The wisdom and experience evidenced in the particular maritime institutions of other commercial countries, ought, at least, to be greatly respected. If they serve only as faithful guides, and tried and long-established rules of decision in similar cases, they are of high

and exemplary importance. It must be granted that it is safer to follow them, than to trust entirely to the varying and crooked line of discretion."

(3.) THE DOCTRINE OF THIS COURT.

In the Supreme Court, the rule to be applied with reference to salvage agreements has been dealt with twice incidentally, and in one case it was adjudged to be in accordance with that announced in the Roll of Oleron.

In the *North Carolina*, 15 Pet., 40, a schooner was stranded upon the Pickles Reef, one of the Florida Keys. She was assisted to Indian Key by the wrecking schooner *Hyder Ally*, who took from her deck 110 bales of cotton, when she floated off the reef. On arrival at Indian Key the master referred the amount of compensation to be paid, to the arbitration of two persons described in the survey as "ship masters." The referees awarded 35 per cent. on the value of ship and cargo. The cargo's proportion of the salvage was paid in kind. The captain paid a part of the ship's share in cash, and the balance by draft on his consignees.

The Court considered the merits of the case, and reaching the conclusion that the amount awarded by the arbitrators was unjustly large, decreed that a part of the cargo delivered to the salvors in payment should be returned.

On the general subject Chief Justice Taney (p. 18) said:

"Upon the first question, we have no doubt that there may be cases in which the contract of the captain in relation to the amount of salvage to be paid to the salvors; or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo; and when, from his situation, he is unable to consult them or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage, and he is not bound in all cases to wait for the decision of a court of admiralty.

"So, too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners that the amount should be settled at once by the captain, and the vessel

proceed on her voyage, without waiting even a day for the purpose of consulting them. But in all such cases unless the acts of the master are ratified by the owners, his conduct will be carefully watched and scrutinized by the Court, and his contracts will not be regarded as binding upon the parties concerned, unless they appear to have been *bona fide*, and such as a discreet owner, placed in the like circumstances, would probably have made. If he settles the amount by agreement those who claim under it must show that the salvage allowed was reasonable and just. If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair and the referees worthy of the trust. But in this case the conduct of the captain is without excuse. The salvage demanded was exorbitant, the danger of the *North Carolina* was by no means imminent when she was discovered by the *Hyder Ally*; nor did the latter incur any hazard in going to her relief. The weather was moderate, and she floated in a few hours."

In *Post* v. *Jones*, 19 Howard, 150, a whaling vessel, with a cargo of oil and bone, was stranded near shore in Behring's Strait. There was communication with the shore, and the Court found that the crew, with the boats, could have landed the cargo, but the country was uninhabited, and it could only have reached a market by being removed to another vessel. Three other whaling vessels having come up, the ship and cargo were sold to them by auction; but the Court was not satisfied of the *bona fides* of this transaction. These vessels having subsequently arrived in Sag Harbor, Long Island, the libelants, owners of the stranded vessel and cargo, filed their libel, praying to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to salvage and freight (p. 156). The Court sustained this libel, awarding a moiety of the salved property as salvage, directing that the other moiety be delivered to the owner, subject to freight theron.

In the course of the opinion, Mr. Justice Grier (p. 160) said:

"The certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance, in saving the neighbor's property. It has been con-

tended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, *where the salvor has not taken advantage of his power to make an unreasonable bargain;* but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumn., 210). *The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services.* We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

In the *Tornado*, 109 U. S., 110, the owners of three steam tugs which had pumping machinery were employed by the master and agent of a steamship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for the compensation of $50 per hour for each boat, "to continue until the boats are discharged."

When the boats were about to begin pumping the vessel was seized by a United States Marshal, under a libel for salvage, but the marshal permitted the tugs to pump out the ship. After they had pumped for about eighteen hours the ship was raised and placed in a position of safety. The tugs remained by the ship ready to assist her in case the fire broke out again, during the period of twelve days. They claimed compensation for the entire time, at the contract price. The District Court refused to uphold the contract, but allowed each tug the lump sum of $500 and a similar amount to the crew of each tug.

On appeal by the owners of the tugs, the Circuit Court decreed to each of them the sum of $1,000. On their further appeal this Court affirmed the decree.

After reviewing the facts, Mr. Justice Blatchford (pp. 116, 117) announced the following principles:

"On these facts, we are of opinien that *to enforce the contract as one continuing during the time claimed by*

the libelants would be higlly inequitable; and that as against the insurers of the cargo, the right of the boats to compensation must be regarded as having terminated when the ship and cargo were raised, and the boats must be regarded as having been then discharged, within any fair interpretation which can be given to the contract. A compensation of $50 per hour, for the 18 hours of actual pumping, would amount to $900. *Every agreement for salvage compensation is subject, as to amount, to the judgment of the Court, as to its being equitable and conformable to the merits of the case"* (2 *Parsons on Shipping*, 306; *The Helen and George*, Swabey, 368; *Jones on Salvage*, 94 *et seq*).

The passages from the text books and from the case of *The Helen and George*, which are cited with approval in the opinion of Mr. Justice Blatchford (*supra*), are as follows:

In 2 *Parsons Shipping & Admiralty*, *p.* 306, the rule is stated:

" If, at the time of the service, the salvors make a bargain with the owners of the property in peril, or their servants, as to the amount of salvage, this is *enforced by the Court only so far as it seems equitable and conformable to the merits of the case, and it is wholly disregarded, if it be deemed unconscionable and oppressive to the owners of the property saved*, or entered into under circumstances which amount to compulsion (citing The *Jenny Lind*, Newb. Adm., 443; The *Emulous*, 1 Sumn., 207; *Bearse* v. *Pigs of Copper*, 1 Stor., 314; *Post* v. *Jones*, 19 How., 150; The *Brothers*, Bee, 136; The *Ship Nancy*, Bee, 139; The *Theodore*, Swabey Adm., 351; The *Enchantrees*, Lush. Adm., 93; The *Crus V.*, Lush. Adm., 583; The *H. D. Bacon*, Newb., 274; The *Helen and George*, Swabey, 368).

In *Jones on Salvage* (pp. 97, 98) it is said:

" The Court will also refuse to recognize an agreement where the master improperly or recklessly contracts to pay the salvors an exorbitant amount. In the *Theodore*, Swabey, 351, the salvors induced the master of a vessel which had parted from her first anchor and was driving, with another anchor down, but was otherwise in no danger to enter into an agreement to pay them £200 for bringing the vessel into port, which they did after a service of about four hours; the Court held the agreement

to be an exorbiant one, and pronounced against the agreement and for the sufficiency of a tender of £50 by the owners. * * * If, on the other hand, the agreement should be unjust or inequitable towards the salvors, the Court will refuse to recognize it. And where the owners of a vessel to which valuable services have been rendered whilst she was in a position of considerable danger alleged that the salvors agreed to do the work for eight shillings six pence, the Court regarding this amount as futile, gave the salvors £10 and costs. In *The Phantom*, L. R., 1 Adm., 58, Dr. LUSHINGTON, p. 61, said: 'However much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement, if it is unjust and inequitable' (The *Kingalock*, 1 Spinks, 263)."

In the *Helen and George, Swabey*, 368, 369, Dr. Lushington said:

"The principle upon which the courts act is that if satisfied that an agreement has been made, it will carry it into effect, unless totally contrary to the equity of the case; but the owner of the ship against whom the agreement is attempted to be enforced may show that it was improperly obtained. *The owner of the ship may contend that, under the circumstances, the sum of money was grossly exorbitant*, and *a fortiori*, if he can show that the agreement was obtained by a fraud or compulsion, no court would hold it to be binding."

In this connection it is pertinent to quote the rule as laid down in two other leading American text books:

In *Marvin on Wreck and Salvage, Sec.* 119, it is said:

"It is also competent for the parties interested to agree upon a stipulated sum, as a salvage reward, for the rendition of salvage services, to be paid only in the event that such services save, or contribute to save, the property. Such an agreement does not alter the nature of the service as a salvage service; but only fixes the rule by which the Court is to be governed in awarding the compensation (Schooner *Emulous*, 1 Sum., 207; *Bearse* v. *Pigs of Copper*, 1 Story, 323; *Otis* v. Brig *Whitaker*, 18 Law Reporter, 496). It is within the authority of a master of a vessel in distress to enter into such an agreement; and, also, within the authority of the master of a salving vessel to bind his owners and crew by such agreement (The *True Blue*, 2 W. Rob., 179). When such agreement is fairly made and fully understood by the salvors, and the condition of the ship is fully disclosed to them or known by them, it will

bind them and become the measure of their compensation; notwithstanding a change of circumstances may increase the labor and difficulty of performance beyond what was originally contemplated by them. But if the condition of the ship was unknown to them, or not disclosed to them, the agreement will not bind them (The *Kingalock*, 26 Eng. L. & Eq., 596; The *True Blue*, 2 W. Rob., 180; The *Graces*, *Id.*, 294; The *Henry*, 15 Jurist, 183; 2 Eng. L. & Eq., 564; The *Resultatet*, 22 Eng. L. & Eq., 620; The *Firefly*, 29 Law Times, 147) And *such agreement will not be binding upon the master or owner of the property, unless the Court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable.* 'This doctrine is founded upon principles of sound policy, as well as upon just views of moral obligation. No system of jurisprudence founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice' (The Schooner *Emulous*, 1 Sum., 207; *Laws of Oleron*, Art. 4)."

Conkling's Admiralty, p. 280:

"Contracts of this nature, however, are not held obli-
"gatory by courts of admiralty upon the owners of the
"property saved, *unless it clearly appears* that no advan-
"tage was taken of their situation, *and that the rate of*
"*compensation is just and reasonable.* In that case the
"stipulated rate of allowance will generally be adopted
"and enforced by the Court as just and conscientious."

(1.) The Rule of the Circuit and District Courts.

The prevailing rule in the District and Circuit Courts has been to hold that agreements for salvage are not binding upon the owner of the property saved, unless the Court can clearly see (1) that no advantage has been taken of the parties' situation, *and* (2) that the rule of compensation agreed upon is just and reasonable for the services rendered.

In 1799, Judge Bee held that agreements entered into at sea, by persons in distress, were void, and that compensation for salvage must be reasonable and such as the Court could sanction (The *Ship Nancy*, Bee, 139; The *Brothers*, Bee, 136).

The case of the *Jenny Lind* (Newberry, 443), was a stranding in the Mississippi River. An agreement was made for the removal of the vessel and her cargo for a stated sum. Judge McCaleb found that the amount was excessive and exorbitant, and setting the contract aside, awarded a salvage compensation. In announcing the principles that guided his action he said (p. 447):

"But while I am clear in the opinion that I have no power to refuse to exercise a jurisdiction, which has been so fully and unequivocally conferred, and while I am satisfied from the evidence that the services performed by the salvors in this case are of a highly meritorious character, I am yet constrained to differ very materially from the view taken by the captain of the *Hungarian* in his estimate of the value of those services. *Such contracts* as the one which he thought proper to execute, in favor of the libelant (Williams), *will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with its own equitable discretion in filing the quantum of compensation. It would be absurd to call upon this Court to enforce the specific performance of such contracts.* They may, and often do, form a fair and equitable criterion in awarding compensation for salvage services, if those services have been rendered under circumstances which show that the parties have voluntarily, and without any controlling necessity, on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum queruent*, in either case it does not alter the nature of the service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. But *contracts made for salvage services are not held obligatory by a court of admiralty upon the persons whose property is saved, unless the Court can clearly see that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable.* The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. And it has been remarked with equal justice and elegance, that no system

of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive and exorbitant; that he might turn the price of safety to the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit which would outrage human feelings and disgrace human justice (*The Schooner Emulous*, 1 *Sumner*, 210)."

The appellants endeavor to create the impression that Mr. Justice Story favored the enforcement of salvage agreements with a certain degree of strictness.

The case of *Bearse* v. *Pigs of Copper* (1 Story, 314) has been referred to. It was a case involving but a small amount. It concerned the salvage of certain pigs of copper which formed part of the cargo of a schooner stranded on Pollock Rip, and which had afterwards broken up. Judge Story expressly said:

"There is not, in my judgment, any ground to assert that any fixed or definite contract for the service existed between the parties."

The statement quoted in the appellants' brief (p. 59) was purely a dictum, and was based upon the very special circstances of the case, and upon the statement of the Court that the copper had been under water some time; that there was no controlling necessity requiring immediate relief, nor any expense or hazard, and no duty on the part of the salvors to render the service, and there was abundant opportunity on the part of the owners of the salved property to obtain other assistance—elements all of which exist *e converso* in the case at bar.

Judge Story's views on this subject are more fully set forth in the case of the *Emulous*, 1 Sumner, 207. This was a case of stranding on Nashuan Island, in Vineyard Sound. She was subsequently floated off and brought into the harbor of Edgartown for repairs. In the course of his decision, Mr. Justice Story said:

"I take it to be very clear that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the

sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services *quantum meruerunt;* in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. *It is true, that contracts made for salvage services are not ordinarily held obligatory by the Court of Admiralty upon the person whose property is saved, unless the Court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable.* The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exhorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty into a traffic of profit which would outrage human feelings and disgrace human justice."

The *Ellen Holgate* (8 Fed. Cas., 509), was the case of a schooner sunk in shoal water in the Delaware Bay, near Reedy Island, in consequence of a collision. She was salved by two tugboats under an agreement with the master to pay $2,000 upon her delivery at Philadelphia. Bradford, *J.*, in announcing the principles upon which his judgment proceeded, said (p. 510):

" As this was especially a salvage service, there must be a reward measured by the rules that apply to salvage cases, and *no contract can be permitted to stand which would compensate the salvors to a great degree more than they would be entitled to for a salvage service were there no contract;* but when it does appear that the contract was entered into fairly without any commission or taking undue advantage to make an unconscionable bargain, and in point of fact, in the judgment of the Court, the *price agreed to be paid did not much vary in amount from what*

the libelants would have been entitled to for a salvage reward, then in our judgment the contract should not be disturbed."

At page 512, the Court further said:

"If the $2,000 claimed as due under the contract exceeds in any considerable degree what the Court would have awarded without such contract, as a salvage service, then the contract should be set aside. If not it will be sustained; *so that the question really is, what are the tugs entitled to as a salvage reward?*"

The Judge then proceeded to consider the peril of the rescuing vessel, the risk to the salvors and to their property; their equipment for the service on which they entered; the duration of the service; the skill and energy employed, and the work they left to perform it, and reached the conclusion, upon the merits, that the amount agreed to be paid was reasonable compensation for what the salvors actually did. The contract sum of $2,000 was awarded, with an allowance of $70 additional for the salvors' outlays.

In the *A. D. Patchin*, 1 Blatchford, 414, an agreement was made between the captain of a steamer and the owner of a stranded vessel, that the former should render such salvage services as might be necessary, at the rate of $450 per day. The Circuit Court affirmed a salvage award of the District Court, equal to the stipulated amount, Mr. Justice Nelson remarking:

"That contract was not necessarily binding upon the vessel in peril, or upon her owner; and it would have been the duty of the Court to have disregarded it altogether, and to have awarded a rate of compensation according to the principles of admiralty in salvage cases, if any advantage had been taken by the libelant in fixing the rate in the agreement. The rate thus fixed is looked at in determining the amount proper to be awarded for the salvage service; but would be disregarded, *if disproportionate and unreasonable, or if extorted through the pressure of impending calamity.*"

In the *J. G. Paint*, 1 Benedict, 545, Mr. Justice Blatchford, then District Judge, had before him a case of an

agreement of salvage service, and dealt with it as follows (p. 550):

"It is well settled that courts of admiralty will not allow a salvor to take advantage of his situation, and to avail himself of the calamities of others to drive a bargain; but yet they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain. *Post* v. *Jones*, 19 How. (60 U. S.), 160; The *Emulous* (Case No. 4,480); The *A. D. Patchin* (*Id.*, 87).

"After a careful consideration of all the facts in this case, I am unable to come to the conclusion that the sum agreed upon, $3,000, is an unreasonable compensation *for the service rendered*, or that the agreement to pay it was made under such circumstances that the sum fixed by the agreement ought not to be taken as the measure of the salvage compensation."

The steamer *Adirondack*, of 1,502 tons register, bound from New York to Liverpool, with a cargo of cotton, grain and salt beef, and valued, with her cargo, at $300,000, broke her low pressure piston, entirely disabling her machinery for the time being. It would have been practicable, in two or three days, with the appliances on board, to get the ship under steam with the use of the remaining engine. While in latitude 59° 44″ west, about 450 miles off Halifax, the nearest port, and 662 miles from New York, she was taken in tow by the steamer *Plainmeller*, under a written agreement to pay £4,000 for towage to New York. This agreement was made only after the captain of the *Adirondack* had attempted unsuccessfully to obtain a lower price. It was held that the contract was unjust, and made by parties not upon equal terms; that it should be set aside and a decree entered for $7,500, the amount of a tender deposited in court by the claimant.

Choate, *J.*, said:

"Upon these facts, I think there can be no question that the sum demanded by the captain of the *Plainmeller*, and finally assented to by the captain of the *Adirondack* (£4,000), was very largely *in excess of that liberal compensation which courts of admiralty award for* SIMILAR SERVICES, and that the amount tendered, which is a little more than £1,500, is fully up to the measure of salvage

award which any court of admiralty would give for the service rendered.

"The *Adirondack* was in no present peril. She was temporarily disabled in her machinery, but unless overtaken by very tempestuous weather, her machinery could have been soon repaired so that she could proceed on her voyage. Her cargo was not perishable. There is no proof that the broken machinery endangered the safety of the ship. She was otherwise sound and able to keep the sea for an indefinite time. The place where she was was the open ocean, with no risk of going ashore. She had no passengers. * * * In respect to the special contract for £4,000 in this case, it must be held that it was unjust and unreasonable in amount. *While there is no charge of fraudulent practice by which the agreement upon this sum was procured, there is evidence enough that the agreement was improvident and entered into without much consideration of the proper elements of a salvage award.*

"The contract recites that the *Adirondack* was totally disabled as to her machinery. This was true as to her temporary disability, but misleading as a statement of absolute disability. The captain of the *Plainmeller* insisted on his own terms and made the agreement of them a condition of rendering any assistance. I think he took advantage of the situation of Captain Robert to exact from his circumstances of present distress an exorbitant and grossly excessive amount. *The master of the Adirondack was inexperienced.. This was his first voyage as master.* He knew little or nothing of machinery, and seems not entirely to have relied on what his engineer told him as to their ability to repair and go on under steam. His judgment was overborne by the pressure of the circumstances in which he was placed, to that degree which fully *justifies a court of admiralty in relieving the owners of his ship from the inequitable bargain into which he improvidently entered.*"

The *Adirondack*, 2 Fep. Reb., 387.

A canal-boat, loaded with coal, sank in the Kill Von Kull and the master made a written contract with the libelant to award him 60 per cent. of the value of the cargo (which would amount to some $900) for his services in raising it.

In an action setting up the contract, and praying for such salvage award as might be just, the contract was disregarded and $250 awarded.

Benedict, *J.*, said:

"Agreements to pay for salvage services, made by masters of canal-boats, when within easy reach of all parties interested in the property to be saved, are subject to be closely scrutinized, and will not be upheld in a court of admiralty when it appears that the price agreed on by the master is unreasonable or exorbitant."

202 *Tons of Coal*, 7 Benedict, 343.

A schooner lying at a pier on the other side of which a vessel was burning, was hauled out into the stream by a tug, under an agreement by the mate in charge to pay $500. The libel was based upon the contract.

Benedict, *J.* (p. 180), said:

"The contract upon which the libelant relies was entered into when the vessel was actually in no great peril for the weight of the evidence is that steam fire engines were upon the dock, which proved able to prevent the dock shed from catching fire, and which were able to have preserved the schooner, even if the shed had caught fire. There was, nevertheless, apparent peril, sufficient to affect the judgment of the mate in charge and to justify a desire to move the schooner. * * * For such a service, the demand of $500 appears to me exorbitant. The circumstances did not justify the making of such a demand, nor the acquiescence in it by the mate. The amount should be reduced to $100."

The *Jacob E. Ridgway*, 8 Benedict, 179.

A tug, having a brig in tow for the harbor of New York, carelessly ran her aground on the Romer Shoal inside Sandy Hook and was unable to pull her off; but the next morning, another tug coming to the spot, the master of the brig made an agreement to be towed off for $2,500, and the two tugs got the brig off. *Held*, upon a libel for salvage, that the agreement was exorbitant, and that the $1,250 was a sufficient compensation for the service, of which sum the second tug was entitled to one-half, but the other tug, having been the cause of the disaster, was not allowed anything.

The *Homely*, 8 Benedict, 495.

In the *Sophia Hanson*, 16 Fed. Rep., 144, Benedict, *J.*, said:

"If this action was based upon a contract made between the master of the schooner that grounded on the West Bank in the Lower Bay of New York harbor, and the tug that pulled her off, as a contract for towage, the libelant could not recover for the reason that the Court would not enforce an agreement to pay $1,000 for a few hours of ordinary towage service, such an agreement being clearly unconscionable. But the action is not based upon contract. The claim rests upon a salvage service performed. *In such an action the agreement of the master to pay* $1,000 *for the service is by no means conclusive on the question of the amount of salvage to be awarded* * * * That service consisted simply in pulling the schooner off the West Bank where she had grounded on an ebb tide, having missed stays. * * * I consider $500 to be a liberal salvage compensation."

In the *Young America*, 20 Fed. R., 926, a libel was filed for a salvage service, which consisted in towing a ship away from the neighborhood of fire, where she was in apparent, though not in real, danger, under a contract to pay $1,000 for the service. It was held that the contract could not be enforced, and $300 was awarded. Nixon, *J.*, said:

"Contracts of this nature entered into the midst of excitement are justly regarded by the Court with suspicion, especially when they are of such an unconscionable character. Neither the Waite and Young America was subjected to any peril which authorized the demand for the agreement to pay any such sum for a service without risk and of such short duration."

The case of the *R. D. Bibber*, 33 Fed. Rep., 55, decided on appeal in Circuit Court for this circuit in 1887, is not in point for the appellees. The Court, in that case, expressly found that the 50 per cent. stipulated in the contract for the salvage of a vessel laden with railroad iron, where the vessel had been abandoned, *was not in excess of the usual cost of salvage of a vessel with such a cargo on that coast; and that the amount was reasonable*, and "does not exceed to any great extent the actual cost for

work and labor to salve wrecked railroad iron." It was also found that the vessel and cargo were saved at the risk of serious damage to the property engaged in the work of salvage, one of the lighters being injured, and the crew suffering much hardship. The service was principally lighterage service. Pardee, Circuit Judge, distinguishing the case of the *Hesper*, 18 Fed. Rep., 672, said:

"The *Hesper* was a steamship aground in fair weather, under the control of her master and crew, who did not abandon her to salvors, and the services rendered her were at the procurement of her agents. The salvage of the *Hesper* was due as much to her machinery and her master and crew as to the services of the lighters and tugs called to her aid."

In the *H. D. Bacon*, Newb., 279, on which appellants also rely (Brief, p. 59), Judge Wells concluded his opinion with an express finding that the amount stipulated for in the agreement was just and reasonable for the services rendered.

A ship valued at $25,000, laden with a cargo of sugar worth $50,000, and drawing 14½ feet of water, went aground upon a rocky ridge, extending obliquely under her, from the starboard quarter nearly to the port bow, upon which there were but 12 feet of water. Under a written contract, which was attached to the libel, by which the master, being unable to obtain a better offer, agreed to pay $10,000 for getting his vessel afloat, she was hauled off after 20 hours' work by means of a partial discharge into schooners, and by heaving upon a large hawser made fast to an anchor. The contract was set aside and an award made of $7,875. LOCKE, *J.*, said:

"The contract which was made between the master and the salvors can have no binding force upon the owners, *as although probably no especial force or influence was brought to bear upon the master, yet the position in which the property in his charge was placed and the necessity of immediate action compelling the contract, is recognized in admiralty law.* It certainly cannot be said that no advantage was taken of the master on account of the position in which his vessel was placed, as that position was the very foundation of the contract. It was

not a voluntary contract on his part. * * * If, from any mistaken idea in regard to the delays and expenses of the Court, he desired to make a bargain rather than to submit to a judicial decision, he was, nevertheless, from the surrounding circumstances, forced to make one that his unbiased judgment would not have approved, had it not been for the position in which he was placed. It was out of his power to obtain assistance in any other way. There were no competing bidders for work, and he was compelled to make the best bargain he could, no matter how inequitable it might be."

The Court thereupon awarded $7,875, together with costs, charges and expenses to be taxed.

The *Tennasserim*, 47 Fed. Rep., 119.

The steamer *Sirius*, valued with cargo and freight at $143,539, was lying at anchor in a disabled condition, near an island off Lower California, in a situation which would be dangerous if a storm arose, and was towed 320 miles to port by the *Tillamook*, under a contract for $20,000. The master of the *Tillamook* would not help for less, but offered, in the alternative, to furnish stores and to take an officer gratuitously to San Diego for assistance, but the master of the *Sirius* was unwilling to take the risk of a storm arising in the meantime.

The libel was based upon the contract.

The towage service was rendered by the tug without difficulty or danger, and was completed in fair weather.

Gilbert, Circuit Judge, who delivered the opinion of the Court (p. 857), said:

"Should the contract, made, as it was, under these circumstances, be enforced? The law applicable to the subject is well expressed in the decision of the Supreme Court in *Post* v. *Jones*, 19 How., 158:

" 'Courts of admirality will enforce contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation, and avail himself of the calamities of others, to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic or profit. The general interests of commerce will be much better promoted by re-

quiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services.'

"The doctrine thus declared early in the history of the the Court has been affirmed in more recent decisions. In the case of the *Tornado*, 109 U. S., 117; 3 Sup. Ct. Rep., 78, the Court said:

" 'Every agreement for salvage compensation is subject, as to amount, to the judgment of the Court as to its being equitable, and conformable to the merits of the case.'

"There can be no question that the service rendered by the *Tillamook* was a salvage service, and not one of mere towage. This is distinctly alleged in the libel. The averments are that the *Sirius* was in an entirely helpless and disabled condition in consequence of the breaking of her shaft and the loss of her propeller, and that her sails were not sufficient to keep her head to the sea, or to prevent her from drifting with the currents, and that, had it not been for the assistance so rendered her, she and her cargo and the lives of all on board would have been in danger of being lost. The evidence sustains these averments. It is equally clear that the price charged by the Tillamook was an exorbitant one. She was put to little inconvenience or expense. She deviated but little from the course of her regular voyage, and it is not shown that she thereby suffered loss of other business. * * *

"In our view of the facts, therefore, the master of the *Tillamook* took an unfair advantage of his power and made an inequitable bargain not conformable to the merits of the case, and the towage contract should not be enforced. * * * In our opinion a liberal recompense to the *Tillamook* for the salvage service rendered in this case would be the sum of $8.000."

The *Sirius*, 15 U. S. App., 191 Circuit Court Court of Appeals, Ninth Circuit; Reversing the *Sirius*, 53 Fed. R., 611.

The case of the *Wellington*, 52 Fed., 605, on which the appellants rely (Brief, p. 61), is distinguishable from the present in a number of its essential facts. (1) The disabled vessel which had lost her propeller blades, and drifted near the mouth of the Columbia River, was in communication with a steamer which offered to tow her to safe anchorage near the Columbia River, which offer was declined, apparently upon the ground that the master wanted to make San Francisco. (2) Having been offered a tow to a safe an-

chorage in the Columbia River, the captain declined it, and hailed the steamer Montserrat bound for San Francisco, with a cargo of coal, and desired to be taken to that port. The Montserrat was not fitted for towage services, and neither vessel had proper towing lines. The sum of $15,000 was agreed upon for the towage. (3) The towage was for a long distance, and the values large, and there was no such disparity between the amount agreed upon for compensation, and that which the Court would have awarded irrespective of the contract.

The case was distinguished upon the above grounds by the Court of Appeals of the Ninth Circuit, in the *Sirius*, 15 U. S. App., 191.

In *The Don Carlos*, 47 Fed., 746, a barque worth $15,000 with a cargo and freight worth $38,000, stranded on South Beach, near the entrance of the Bay of San Francisco. News of the stranding was telephoned to San Francisco, and the libelant's tug was immediately sent to the rescue. At her arrival there was a rolling swell, sufficient, combined with the ebb tide, to swing the barque broadside to the shore, when it was reasonably certain that she would soon become so banked with sand as to render her removal impossible. The evidence showed that other like vessels, stranded at or near the same place, with two exceptions, had been lost. The captain of the tug refused to render assistance, except on the master's agreement to pay $8,000, which, after trying to obtain better terms, he agreed to do. The tug at once began pulling, and prevented the barque from swinging. Two other powerful tugs soon arrived, and the master of the barque agreed to pay $2,000 additional for their assistance. In about two hours and a half they succeeded in pulling the ship off. She was then towed into the bay and put aground on the Mud Flats. None of the tugs was in any danger Held that the demand for $8,000 for the services of the tug was exorbitant, and would not be enforced.

Ross, *J.* (p. 748) said:

"The perplexing question is, what is a just award to be made the libelants, in view of all the circumstances of the

case? *I do not think the amount of the contract for the services of The Alert* ($8,000) *is an equitable criterion by*

Addendum.

Brief for the *Elfrida*, p. 31.

With reference to the remark of Brown, *J.*, in the *Schiedam*, 48 Fed., 923 (quoted on the brief for the Elfrida, p. 31), that "*viewed as a reward, salvage is not properly a subject of any binding contract in advance,*" the attention of the Court is respectfully called to the definition of salvage by Mr. Justice Bradley, in the case of the *Suliote*, 5 Fed., 99, 102:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

Regarding salvage compensation not only as an award for services performed, but also as a reward based upon principles of public policy and commercial interest, it cannot properly be the subject of a binding contract in advance to be specifically enforced by a Court of Admiralty. A contract for a reward is a contradiction in terms.

sum agreed on in advance and in the presence of danger may, therefore, limit the salvor, it has little or no binding effect upon the other party. *All courts of ad-*

case? *I do not think the amount of the contract for the services of The Alert* ($8,000) *is an equitable criterion by which to fix the compensation for her services.* The tug came promptly, it is true, and she took on board from the life boat, a man, woman and child, all of whom had been taken from the barque by the life-boat. But their lives were not in danger, nor was the tug in danger. There was but little wind, and she had plenty of water in which to move. In no respect that I can see, did she take any particular risk in undertaking the service. The barque was in great danger of swinging round broadside to the beach, and of being so banked in with sand as to render it impossible to pull her off; but for the captain of the Alert to demand $8,000 for making fast to and pulling on her, under the circumstances of the case, was, in my opinion, exorbitant; and, that being so, his refusal to render the barque any assistance until the master agreed to pay him that sum, renders it proper for the Court to disregard the master's consent to do so."

The Court examined all the circumstances and awarded $5,500 for all three tugs, with an additional $225 for the services of one of the tugs in standing by during the night after the *Don Carlos* was brought into port.

In The *Schiedam* (48 Fed., 923), Judge Brown most admirably stated the rule on this subject:

"The compensation awarded in a court of admiralty for salvage services is not given as a mere *quantum meruit* for the work and labor done, but on grounds of public policy, in the interest of navigation and for the safety of property and life, and as an encouragement and reward for the readiness, promptitude and energy necessary to secure those ends, both in the conduct of the salvors personally and for the vessels and other appliances previously provided for such service. *Viewed as a reward, therefore, salvage is not properly a subject of any binding contract in advance,* except as a limitation of the salvor's demands. In cases of present distress and peril, *the very necessity for salvage services presupposes that the parties do not stand upon equal terms as respects any contract they may make on the subject* any more than a captured prisoner in stipulating with brigands for his ransom While a sum agreed on in advance and in the presence of danger may, therefore, limit the salvor, it has little or no binding effect upon the other party. *All courts of ad-*

miralty freely examine into the circumstances in the interest of the latter, and award no more than a reasonable sum without regard to the amount agreed on. See *Chapman v. Engines, etc.*, 38 Fed., 671, 672 and cases there cited."

In *Chapman v. The Engines of the Greenpoint*, 38 Fed., 671, 672, to which reference was thus made, Judge Brown had held:

"Agreements between the parties fixing a definite sum to be paid for services of a salvage nature are treated as attempts merely to regulate the amount of compensation not otherwise affecting the nature of the contract or the right to a lien if successful. Such agreements are very common and *are upheld by courts of admiralty if reasonable in amount;* if oppressive or extortionate, they are disregarded."

The *G. W. Jones*, 48 Fed., 925, holds the exact contrary of the point for which it is cited by the appellant (Brief, pp. 56-57). The contract was for $2,500. The Court on the facts before it, failed to find any compulsion in the making of the contract (p. 926), but concluded it was for a somewhat excessive compensation, and *reduced the sum to be paid* to $2,000. Brown, *J.*, said (p. 926):

"Although the answer does not deny the value of the services, yet a court of admiralty would not enforce a contract of this nature, either against the owners or against their property in a suit *in rem*, any further than it appeared to be reasonable (the *Adirondack*, 2 Fed., 387; the *Hesper*, 18 Fed., 692; the *M. B. Stetson*, 1 Low., 119; the *John Ritson*, 35 Fed., 663; the *Schiedam*, 48 Fed., 923) * * * I think that as no such injury [to the tug] was received, and the service was comparatively short, $2,000 will be sufficiently liberal compensation and a proper one in the present case."

The *Alert*, 56 F., 720, upon which the appellants greatly rely (Brief, pp. 49-50), does not support their contentions. It was the case of a contract made in New York, under which a salvage expedition was sent out to Barranquilla, South America, to salve a vessel stranded near that port. The agreement was made by the shipowner's resident agents and the agent for underwriters on the hull, and

was the best that could be made with any salvage company capable of doing the work, that could be reached from that business centre. The case did not involve any issue of compulsion or of unreasonableness. The ground on which the contract was resisted, was alleged mutual mistake as to the values at risk. The salvors had to send their plant —— miles to reach the wreck. It was problematical whether anything would be left to salve by the time they got there. The sending of the expedition was attended with heavy expense. On all the facts the Court found in substance that the contract provided only a reasonable compensation for what was done. This is shown by the fact that, *although the contract did not bind the cargo, the Court awarded the same rate of compensation for salving it, as was provided in the contract for salving the ship* (pp. 726, 727).

In the course of his opinion Judge Brown restated the principles on which he has always acted, as follows (p. 724):

" Where the subject of the contract is a salvage service the Court under the law applicable to that special head of jurisdiction, *may inquire into all the circumstances of the salvage contract, including its reasonableness and fairness;* and in doing this it must take note of the fact of a mutual mistake, if that is proved to exist, and award only such compensation as justice and equity may permit. *The right and the duty of a Court of Admiralty to examine into the fairness and reasonableness of every salvage contract whenever its fairness is challenged have been repeatedly asserted by the Supreme Court; and such has been the uniform practice in this district as well as others.*"

Judge Pardee seemed to feel the pinch of a *dictum* by Judge Locke, in which he had concurred, in the case of the *Agnes I. Grace* (2 U. S. App., 317), where the Court said;

" Before the performance of the service, the agreement appears to have been considered by all fair and just, and if so, then it cannot now be considered otherwise, because of its successful rendition by the appellees, who had assumed all expense and risk. Although the amount given may, under the circumstances, appear high in proportion

to the value of the property saved, this Court does not deem it sufficiently unreasonable to disturb the judgment of the Court below."

The *dictum*, we submit with all deference, squints at a rule contrary to that sanctioned by the great weight of authority. But if it be deemed correct, it had no just application to the case in hand, as will appear from a comparison of the two cases. The *Grace* was a wooden schooner, with a hole in her bottom, and the water rising and falling inside of her with the rise and fall of the tide, while the *Elfrida* was a staunch iron steamer, wholly undamaged. The schooner was lying where at low tide she was more than *two miles* from water sufficient to float her, while the steamer had not crossed any bar, and with a rise of tide of only 3 feet, was floated by being hauled a thousand feet. The schooner, having no propeller or winches or steam pump, was without the means of helping herself or of aiding the salvors to get her off, while *Elfrida*, with the aid only of three of the salvors' anchors, hauled herself off with her own power. The schooner was without adequate pumps; the *Elfrida* not only was well supplied with pumps, but had a double bottom and tanks extending from stem to stern. The schooner was imbedded from two and a half to three feet in the sand; the steamer, with her water ballast pumped out, probably about six inches, if not wholly free at the stern. The schooner was exposed to the storms of the Atlantic coast, in imminent peril from any wind from the northeast to southeast; the steamer was protected by the jetty from any wind more northerly than southeast, and was lying on a far less dangerous coast. On the one hand, the amount awarded was found to have been a moderate compensation for the service performed; there is no contention in the present case that the amount awarded was moderate or reasonable, apart from the contract.

Judge Speer, who decided the *Grace* case in the District Court, had expressly found that the *contract provided for no more than a reasonable compensation* (2 U. S. App., 332). In dealing with the force and effect of the salvage

agreement he had expressed the correct doctrine on the subject as follows (2 U. S. App., 322):

"It is true, as is insisted by the respondents' counsel, that a contract of this character is not binding upon the Court, and that in all cases of salvage it is competent for the Court to adjudge and assess the amount of the recovery in accordance with the equities of the case, and, if it should appear that a contract of this character was an inequitable one, the Court would, of course, disregard it. But, whenever a contract has been entered into after due deliberation by the parties, and has not been shown to be in any respect an inequitable one, it is exceedingly valuable as evidence to enable the Court to arrive at a just determination. The Court regards this contract *as evidence* in that light, and not as a conclusive contract; but it is a most significant and valuable indication of what should be the true amount of the recovery."

The conflict between the rules laid down in the *Grace* case, and in the present, is more fanciful than real. In the former, the opinion concluded by saying "this Court does not deem it [contract] *sufficiently* unreasonable" to warrant setting it aside. This concedes the principle that a Court of Admiralty may refuse to enforce an agreement if the unreasonableness in the amount is "sufficient." Judge Pardee's dissent in this case (Rec., p. 276) makes the same concession: "I am clearly of opinion that the amount agreed upon is *not excessive to any such extent* as to be unreasonable." This leaves nothing really at issue between the two opinions, but the inquiry: To what extent must an agreement be excessive in order to make it unreasonable? The answer to that inquiry necessarily calls for an examination of the facts, to see what amount would be due as a pure salvage compensation. Comparison of that amount with the sum stipulated for, and that alone, will show the excess. In the case at bar it was found by the majority that $10,000 would be an ample compensation. This showed the agreement was excessive to the extent of $12,000. Was not that excessive "to such an extent as to be unreasonable"? Judge Pardee's opinion is inconclusive, in that though admitting some excess, he holds it was not unreasonable, but omits to state his con-

clusion as to what would be a fair reward, or how great the excess must be to be unreasonable. When the matter is thus boiled down, it seems that the difference between the majority and the minority was really one *of fact*, and not of law. The opinion of the Court found that exorbitancy existed; the dissenting Judge did not. Having found the exorbitancy, the Court were in accord with the great weight of American authority, in declining to enforce the agreement. They were also in accord with the English cases, as we shall now endeavor to show:

(5.) THE ENGLISH RULE.

Quotation has previously been made (*ante*, p. 17), from the case of The *Helen and George*, Swabey, 368, 369, which was cited with approval in The *Tornado*, 109 U. S., 110.

In the *Henry*, 15 Jurist., 183, Dr. Lushington again stated the rule:

"Where agreements are made at sea between salvors and masters of vessels, the Court will always be very desirous to confirm them, if it can do so consistently with equity and justice. The Court would be very reluctant, under ordinary circumstances, to disturb an agreement made between parties, on account of the same appearing too large or too small, *but I do not say that there are not cases in which I should not hesitate for a single moment to pronounce against an agreement, either on the one ground or on the other.*"

In the *Theodore*, Swabey, 357, where nothing more was charged or proved than that the master had "improperly and recklessly" agreed to an altogether excessive payment for a service of little difficulty rendered to a vessel in little danger—towing her off a bar—Dr. Lushington, in declining to enforce the contract, said (p. 352):

"I regret to say on the present occasion—for the Court is generally anxious to protect the interests of salvors—that it is *an exorbitant demand*, and such as no court of justice would be justified in carrying into effect."

Perhaps the clearest statement of the English rule was made by Lord Esher (then Lord Justice Brett) in *Akerblom* v. *Price*, 7 Q. B. D., 129, 132:

"The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what, in the widest sense of the terms, is, under the circumstances of the particular case, fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. * * * If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it, and decree what is fair and just. That is the great fundamental rule."

In *The Mark Lane*, 15 Prob. Div., 135, Butt, *J.* (p. 136), stated the rule thus:

"The plaintiffs are seeking to recover the sum of £5,000 as due to them by agreement, and not, as is usually the case, asking the Court to award such an amount of salvage as it may deem just. I feel satisfied that for services such as those rendered in this case, the Court of Admiralty never has given such an award as £5,000, and I think, having regard to the state of the *Mark Lane*, the distance she was towed, and that £5,000 is more than one fifth of the total value of the salved property, the plaintiffs' demand is exorbitant. * * * I have said that I consider the demand exorbitant. In the cases referred to by counsel, the word 'inequitable' has been used. But I think that what is at the root of the question is this—where it is found that a wholly unreasonable price has been insisted upon by the salvors, and an agreement incorporating it has been signed, the Court looks rather to the position of the parties than to the reasonableness or unreasonableness of the amount. *Were the parties, in fact, contracting on equal terms? It is clear that in the present case they were not. It is true that there is not in this case, the amount of duress which would invalidate an agreement at common law; but in this Court the same amount of compulsion or duress—call it what you will—is not necessary*

to induce the Court to refuse to enforce an agreement. The captain of the *Crete* appears to have said, though not in so many words, 'If you do not sign this agreement to pay £5,000, I will leave you.' His manner and demeanor were such that they led the captain of the *Mark Lane* to believe that that was what he meant to do, and he has not from first to last said that he would either have taken less or have stayed by the *Mark Lane*. The fact is that the master of the *Mark Lane* signed this agreement under compulsion, and, *the amount being exorbitant*, I decline to uphold the agreement."

The Court thereupon considered the merits of the service, and awarded £3,000.

In the *Rialto* (1891) Prob. 175, a steamship of that name was towed by the *Coomassie* to Falmouth; the master of the *Coomassie* insisted on a contract for £6,000, which was signed. The towage lasted three days, and was for a distance of about 430 miles. Butt, *J.*, declined to enforce the contract, but awarded £3,000 salvage, and in the course of his opinion (p. 178), said:

"It has been laid down that the sort of pressure requisite to invalidate an agreement of this nature, and made in such circumstances, is less than the duress required at common law to invalidate an agreement, and the question is: What amount of duress will have that effect? Again, the effect of the decided cases is to show that the agreement insisted upon by the salvors at the time must be inequitable; and then comes the question: What is an inequitable agreement in cases of this sort? On this point, two ingredients are commonly referred to. First, the parties contracting must be shown not to have contracted on equal terms. I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms—that is to say, the master of the salved ship being at a disadvantage—it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement. Now, I have no doubt that the parties stood, as they usually do in such cases, upon unequal terms. The question that follows is: Is £6,000 a wholly unreasonable, or, in other words, an exorbitant sum? I think it is, and, there-

fore, it seems to me that the two things necessary to invalidate the agreement exist here. That being so, and that being a matter entirely for me, the next question is: What amount should the salvors receive? That depends on the usual considerations applicable to cases of this sort."

[The learned Judge then dealt with the evidence as to the nature of the towage, viz., the large size of the two vessels, the risk always attending the manœuvering to get into position to tow a disabled vessel, the rope actually getting round the propeller of the salving vessel, the weather during the towage, the time occupied in towing, and the distance towed, and continued:]

"My opinion, after consulting the Elder Brethren, is that the proper award would be £3,000."

In the *Kingalock*, *Spink's Reports*, 263, 265, a brig, disabled at sea, made a contract for towage to London, for £40. During the service, the master of the tug discovered that the brig had been very seriously damaged, which fact had not been transmitted to him. It was held that the mere concealment of a fact which might operate on the service, and therefore on the agreement, vitiates it. The agreement was set aside, and *increased* compensation was awarded to the salvor.

The Court said (p. 265):

"An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud. * * * I therefore come to the conclusion that, as it might affect the performance of the service, the agreement was null and void *ab initio*."

In the *Phantom*, L. R., 1 A. & E., 58, Dr. Lushington overruled an agreement, and *enlarged* the compensation of salvors, saying:

"There is another matter in all agreements where salvors are going to perform a duty—whether an agreement is just and equitable—because, if it is not, however much it has been agreed upon by both parties, the Court is in the habit of overruling such an agreement, if it is unjust and inequitable."

In Mr. Justice Kennedy's work on *The Law of Civil Salvage* (London, 1891), the English cases are summarized thus (p. 208):

"The duty of an admiralty court to set aside a salvage agreement for an excessive reward, where the salvor has been able practically to dictate his own terms, has been nowhere more powerfully stated than by Story, J., in The Emulous" (1 Sumn., 207, at pp. 210–211.) [Quoting the passage cited *ante*, p. 20.]

"It is not, however; it is submitted only where it is proved that there has been unfair dealing in the shape either of fraud or misrepresentation, or practical compulsion, that the Court will interfere with an agreement which fixes a grossly excessive remuneration. Evidence of any such unfair dealing greatly strengthens, of course, the case against the agreement, but even without such evidence, if it finds the exorbitancy to exist, however that exorbitancy originated, the Court will, alike on principle and on authority, be justified in setting aside the agreement.

"The propriety of disregarding an agreement, if the amount of the award appears to the Court to be inequitable, has, indeed, been recognized by the maritime law from very early times. [Quoting the passage from the Roll of Oleron, cited *ante*, p. 8].

(**6.**) Burden of Proof.

It is but natural, that as respects agreements made with a master who is under, or feels he is under, a controlling necessity to have immediate assistance, the courts should have this inequality of position constantly before their eyes, and should require him who sets up a salvage contract, to prove it was fairly obtained and is for a reason-

able amount. And such is the rule that is generally announced.

The headnote by Mr. Justice Curtis, to the case of the *North Carolina*, 15 Peters, 40, states the rule as follows:

"Though the master may compromise or refer the question of salvage, where he cannot consult his owners without injurious delay, yet his conduct will be closely scrutinized, and his contracts will not bind the owners, unless they appear to have been such as a discreet owner would have made in similar circumstances, and the burden is on those who set up his authority."

In the *British Empire*, 6 Jurist, 608, Dr. Lushington said:

"Now, the general principle, with respect to such agreements, I apprehend to be this, that it lies upon the party setting it up to prove two things, first, that such agreement was made, and secondly that it was just."

In The *Arthur*, 6 Law Times, N. S., 556, Dr. LUSHINGTON again laid down this principle:

"Most clearly the onus in causes of this description lies on those who set up the agreement, and they are bound to prove the agreement was made after consideration, and was fair and equitable."

It is implied, also, in many of the cases before referred to, where the courts have said, in substance, that contracts, made under the stress of assumed need for prompt service, would not be enforced "unless the Court can clearly see that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable."

(7.) SUMMARY.

The foregoing review of the authorities cited by both parties shows that no Court of Admiralty in this or any other country, so far as the counsel on either side of this controversy can find (except the District Court in the present case), has ever enforced a salvage contract that pro-

vided for an excessive or unreasonable compensation for the services that were rendered. Detached expressions may be found here and there in the opinions of judges, intimating that a certain degree of compulsion must also be found, or that the validity of the agreement should be viewed from this or that standpoint; but in every case where the excess was plain, the judges who felt that something else must also be found, found it. The excess is at the root of the whole matter and is sufficient in itself to vitiate every such contract. The notion that some compulsion must also be found to exist may have its origin in the erroneous impression, that this jurisdiction, in admiralty, was derived from the principles of equity. The *dictum* in the *H. D. Bacon*, *Newb.*, Adm., 279, is founded on that misapprehension. Compulsion, or inequality of position between the contracting parties, was presupposed in the judgment of Oleron, which decreed that "the justyce of the country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the merchauntes shall have made, rewarde them." The thing which the "justyce" was enjoined to do, was to see that excessive compensation for services rendered should not be paid, even if promised, in the face of danger. Excess alone was, and under the best considered authorities, still is enough to justify and to require a court of admiralty to refuse its sanction to any agreement tainted with it.

It also appears that there is no difference, either in the cases or in the foreign codes, between the application of the rule to sea contracts and to those made in harbors, or on shore. It is applied wherever the contract is made during the danger. In some of the codes it is made to apply in terms to strandings; and in the *Tornado*, 109 U. S., 110, it seems to have been enforced in relation to a contract made in one of our largest ports. The place where the agreement is made, or the subject of it, is not so important, in the average case, as the unavoidable inequality of position between the contracting parties, so long as the danger to the property continues. However benevolent a court may be to salvors, it cannot wink so hard as not

to see that essential difference in the footing of the parties, so where excess in the contract is made to appear, that, of itself, is deemed sufficient to prevent its being enforced.

On the other hand, it is to be borne in mind that in any disposition which the court of admiralty makes of the case, the salvor will receive an ample and liberal compensation. The question is not, as at law, whether the recovery shall be for the contract sum or for nothing; but whether it shall be for the contract sum or for such other amount as the Court, bearing in mind the public policy involved, may think fit and proper. The courts are also less reluctant to disregard an agreement and to award a salvage compensation, because that of itself is always in excess of mere payment for work, labor and material, or for the services actually performed. Every salvage award carries with it a bounty for the encouragement of salvors, and to stimulate their efforts to the performance of similar services in the future. To offer a salvage compensation, therefore, as was done in the answer in this case, is not to make a niggardly offer of an inadequate reward, but is to tender the fullest payment, with a liberal bounty in addition. More than this, the libelants, under the law, are not entitled to receive, "notwithstanding that promise which the said Mayster * * * made."

II.

The Court of Appeals correctly held that the sum of $22,000, stipulated for in the contract, would be an unreasonably excessive compensation for the services rendered.

The facts and circumstances of the service are fully stated in the learned and valuable opinion delivered by Judge Speer in the Court below. The office of the argument on this branch of the case will, therefore, be limited

to a review of the evidence bearing on the different important elements affecting the amount of the award.

In *Cope* v. *Valette Dry Dock Co.*, 119 U. S., 625, this Court stated the ingredients of a salvage service that affect the award as follows:

"(1.) Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects.

"(2.) The degree of danger and distress from which the property is rescued; whether it were in imminent peril and almost certain to be lost if not at the time rescued and preserved.

"(3.) The degree of labor and skill which the salvors incur and display and the time occupied.

"(4.) Lastly, the value."

Remarking upon these ingredients, the Court said:

"Where all these circumstances concur, a large and liberal award ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated as salvage service; it is little more than a remuneration *pro opere et labore*."

In this classification of the ingredients of a salvage service, the Court placed the risk and enterprise of the salvors first; the value of the salved property last.

According to Lord Stowell, personal risk in the performance of the salvage service is the element which confers the best title to an ample award:

"What enhances the pretensions of salvors most is the actual danger which they have incurred; the value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this is shown to have been hazarded, it is most highly estimated."

The *William Beckford*, 3 Christopher Robinson, 355, 356.

Sir John Nicholl also took the same view.

The *Clifton*, 3 Haggard, 117, 121.

The most recent expression of judicial opinion in England, in this matter, was announced by Lord Justice Lindley, in the Court of Appeal, as follows:

"The first matter of consideration is the nature of the service rendered, the dangers from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to the rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. The next matter for consideration is the value of the property saved."

The *City of Chester*, 9 Probate Division, 182, 202.

In the most recent work on this subject—that of Sir William R. Kennedy, one of the Judges of the Queen's Bench Division, on *The Law of Civil Salvage*, a subdivision of these main heads more convenient for discussion is suggested, with the following comments:

"Some circumstances are always material for consideration, and these have been ascertained by experience, and the Court has for its guidance a long course of judicial decisions to assist it in coming to a proper conclusion in each particular case. These material circumstances which Dr. *Lushington*, in his judgment in the *Charlotte*, 3 Wm. Robinson, 68, 71, calls 'the many and divers ingredients of the salvage service,' it is necessary now to consider in detail. These may be classified as follows:

(*A.*) *As regards the thing salved.*

1. The degree of danger to human life.
2. The degree of danger to property.
3. The value of the property salved.

(*B.*) *As regards the salvor.*

4. The degre of danger to human life.
5. Their skill and conduct.
6. The value of the property employed in the salvage service.
7. The danger to which the property is exposed.
8. The time and labor expended in the performance of the salvage service.
9. Responsibilities incurred in the performance of

the salvage service, such, *e. g.*, as risk to the insurance and liability to passengers or freighters through deviation or delay.

10. A loss or expense incurred in the performance of the salvage service, such, *e. g.*, as detention, loss of profitable trade, or repair of damage caused to ships, boats, or gear." * * *

"Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or where they are present only in a low degree, the salvage remuneration awarded is comparatively small."

Kennedy, Civil Salvage, 119.

How many of these elements exist in the present case, and do those which are found, exist in a high or low degree? The answer to this inquiry will suggest the amount to be awarded apart from contract.

The main facts in connection with the service, have already been stated (*ante*, p. 3).

A. As regards the "Elfrida."

(**1.**) *The degree of danger to human life.*

It is nowhere suggested, in the allegations of proofs, that the lives of those on board the steamer were, at any time, in jeopardy. The proofs negative any suggestion of danger. The weather was fine continuously (*Report of Weather Observer*, *p.* 253), and there was constant communication with the shore by the vessel's small boat (p. 235). The absence of all risk to life shows, at the beginning of the inquiry, that the service is wanting in that element which has always offered the most conspicuous argument for a liberal reward.

"However great may be the danger to the property itself, if it is wholly unattended with the risk to human life, it assumes much less value than when under circumstances where human life is put in peril."

Dr. Lushington in the *Thomas Fielden*, 32 Law Journal, Admiralty, 61, 62.

The *Bartley*, Swabey, 198, 199.

(**2.**) *The degree of danger to the Elfrida.*

This is the point of most importance. It will be convenient to consider (*a*) the actual danger from which she was relieved; (*b*) dangers reasonably to be apprehended in the future.

(**a.**) *The steamer's actual position.*

It fairly appears, from the libelants' own evidence, that the steamship was not, and had not been, in any danger of physical injury, at any time while she was ashore. She was directly head on to the shore (pp. 115, 196, 238, 250), parallel with, and about 300 feet from, the west jetty (p. 114). She was upright (p. 85), and had made a bed for herself in the quicksand, in which she rested, moving with the agitation of the water (pp. 84, 118, 80). She lay about two feet (pp. 101, 84) in the sand (p. 243), and on the same draft she would have had if wholly afloat (pp. 101, 84); but pumping out the water ballast would lighten it 18 inches (pp. 12, 238). Her measured draft on stranding was 11′ 6″ or 11′ 10″ aft and 9′ forward; and after the ballast removed it was 9′ 6″ aft and 9′ forward, while the depth of water was 9′ aft and 7′ forward (*ante*, pp. 3, 4).

The tide, as appears from the record produced by Lieut. Judson of the United States Engineers' Office at Galveston (p. 120) was very irregular. The gauge from which the record was made is at Galveston, but the height of the tides would be substantially the same at Velasco (*Judson*, p. 120). The mean low (p. 121) tide, on the record, is represented by the heaviest black line. During the time the steamer was ashore the high tide varied from about 2′ 9″ up to 3′ 3″, but on two days was as low as two feet. This variation of the depth of water around the steamer, at high tide, may account for the different figures furnished by the different witneses on that subject. The steamer's witnesses said the vessel lay in about nine feet of water, at the top of high tide (pp. 184, 208, 225); and this is expressly admitted in the amended libel (p. 12).

The claim of some of the witnesses, that the dispatch

with which the vessel came off was accounted for by an exteremely high tide, is not borne out by the record. Though the tide was higher on the 17th, than on some of the other days of the month, it was not so high as on the 9th, 10th, 14th and 15th, nor higher than it was on the 15th, 16th, 18th and 19th. It was much higher later in the month (see print, p. 120).

The depth to which the steamer was imbedded in the sand must have varied with the different stages and heights of the tide. The chief engineer, Dove, says: "We weren't bedded much in the sand" (p. 232). On the 9th, when there was a very high tide (see print, p. 120), Morrisey, at 12.10 A. M., telegraphed to Moller & Co. that the *Elfrida* was "*swinging freely on high tides, showing no bed*" (fol. 23, p. 185). The ease and rapidity with which she came off on the 17th, when the tide was four or five inches lower then on the 9th, shows that she could not have been very hard aground.

Her position on the beach was such that the sea affected her but little.

The testimony of libelant's witness, Hutchings, who has been Superintendant of the Life Savings Station of the Gulf of Mexico for 13 years, is important in this connection. He says the shore at Velasco is very flat, sloping out gradually (pp. 96, 99). To reach a (p. 99) depth of 14 or 15 feet, one would probably have to go out three-quarters of a mile (p. 99).

The worst break of the waves, in case of a storm, is in 12 or 16 feet of water (p. 99). As the steamship was lying in 9 feet of water she was well inside of the place where the greatest force of the waves would be broken.

The master also says there was no sea in and about where the ship lay (p. 238). Hutchings says the coast is not so dangerous to a stranded vessel, as that of the Atlantic (p. 99).

By the log it appears that the steamer drifted over the breakwater about 8 P. M. of the 6th, in a considerable sea, and that at 2 A. M. on the 7th she went further on the beach (pp. 245, 246). From then until she was removed from the beach, she lay in the same place, without changing her position (*Coveney*, p. 84). On one day only, Oc-

tober 10th, was there any pounding of the bottom. On that day the log reports strong southerly gale and high sea, ship straining and bumping heavily (p. 246).

On the 14th and 15th, the log reports very strong southeast gale, but the ship "lies fast on the ground," and there is no bumping (p. 247). Bumping on the 10th is probably accounted for by the fact that, with a southerly gale, the incoming waves would strike the vessel slantingly on the port side, while, with a southeast gale, the waves would be directly astern. The ship was lying about southeast and northwest.

Except on these three days, the log reports fine weather; and the evidence of the captain is to the effect that the report of the weather in the log on the 14th and 15th is exaggerated (p. 242). The master and the other witnesses for the steamer say the weather was fine during the whole time that the vessel was on the beach (pp. 234, 235, 236, 241, 225, 226, 228, 242, 244).

The testimony of these witnesses is corroborated by the official weather report (p. 253), from which it appears that the wind was blowing off shore during the time the vessel was on the beach, except on the afternoon of the 9th, and on the 10th, 11th, 12th, 15th, 16th and 17th.

From that unimpeachable record, offered by the libelants, it appears that the weather was clear from October 5th to the end of the report, on the 25th. The wind on the 7th, 8th and 13th was blowing *off shore*, the greatest velocity being 28 miles an hour. On the 9th it was south, with a velocity of 13 miles at 8 A. M. and 7 miles at 8 P. M.; on the 10th it was southeast with a velocity of 5 miles at 8 P. M. and 11 miles at 8 P.M.; on the 11th it was southeast with a velocity of 9 miles at 8 A. M. and 14 miles at 8 P. M.; on the 12th it was southeast with a velocity of 6 miles at 8 A. M. and 11 miles at 8 P. M.; on the 13th it blew off-shore; on the 14th it was easterly with a velocity of 15 miles at 8 A. M. and 7 miles at 8 P. M.; on the 15th it was southeast with a velocity of 9 miles at 8 A. M. and 11 miles at 8 P. M.; on the 16th it was southeast with a velocity of 5 miles at 8 A. M. and 7 miles at 8 P. M.; on the 17th, when the ship was hauled off, the wind was still southeast, with a velocity at 8 A. M. and at 8 P. M. of three miles.

It needs no argument to show she was in no danger from the winds. During the rest of the month 16 miles was the highest velocity recorded (p. 253).

The actual position of the vessel was not one of danger (p. 238). The sand was not banking around her (pp. 206, 210, 212, 87). It was a position from which she was easily and promptly removed. None of the libelants' witnesses pretend that her situation was one of present danger. The danger they spoke of lay in the future. It was potential and was based on the hypothesis of gales between the southeast and southwest.

(b.) *Probable future danger of the vessel.*

Here we enter the region of speculation. The libelants called a number of friendly witnesses, to whom counsel described the position of the vessel with more or less accuracy, who united in saying that in certain conceivable contingencies the ship would probably have been a total loss. But on cross-examination they were unable to point to a single instance where a large iron steamship, ashore anywhere on the Texas coast, had become a total loss. There was some evidence that wooden vessels, which had no steam power to aid in getting them off, and whose cargoes were not stated, had broken up. Some small iron boats had also been lost. One vessel, which had stranded broadside on the beach remained there about two months, and broke her plating so that a witness could put his hand through it. Another witness described the stranding of a steamer further to the southwest, where sand had banked on the inshore side of her, so that a stork stood 10 feet from her, on one leg (p. 104). But this was on a different kind of shore (p. 106) and those vessels were ultimately hauled off.

The gist of the evidence given by the pilots and friends of the libelants, as to the probable future danger of ship, is no more favorable and is less reliable than that of their witness Hutchings, Superintendent of the Life Saving Department, whose evidence has already been referred to, and who was their most competent expert.

Hutchings testified that no iron steamer had been lost

on that coast from stranding in his thirteen years' experience (p. 100). He mentioned but one instance of an iron vessel which had been seriously damaged (p. 105), and that one was ashore on a part of the coast where the bottom was different from that at Valasco (p. 106).

Considering the danger of a stranded vessel, on the coast, in connection with the probabilities of her ultimate safe removal, this witness testified as follows (p. 100):

"Q. Has there ever been an iron steamer lost on his coast from standing in your experience? A. No, sir.

Q. Every one has been gotton off? A. Yes, sir. One was in an awkward position for ten or eleven days, and it was doubtful whether it would be gotten off or not.

Q. Has it not been the experience of persons knowing about matters of this kind that it is within a reasonable certainty, that a vessel, stranded on a coast like this, can be hauled off by means of anchors, in the ordinary weather which prevails here?

A. Yes, sir. I do not see why an ordinary vessel could not be hauled off with the ordinary apparatus if the weather is favorable, every-day weather.

Q. Is it not [a fact], therefore, that the preponderance of probabilities are in favor of a vessel getting off, when she gets aground, under ordinary circumstances along this coast? A. Yes, large vessels; small ones, no.

Q. Iron steamers in ballast? A. Yes, under ordinary circumstances."

Moller, another witness for libelants, testified (p. 138):

"Q. How long have you been a ship broker? A. For twenty-five years. I have been nineteen years in business for myself.

Q. There have been vessels sent to you before this one that have been beached? A. Yes, sir; I have taken several off myself.

Q. All iron steamers sent to you have gotten off when wrecked? A. Yes, sir.

Q. Mr. Clarke got most of them off, or helped to do so? A. Yes, sir.

Smith, another witness for the libelant, said: "You can almost take anything off the beach. The question is whether it is worth it. If it was up in the prairie it might be gotten off" * * * (p. 74).

The preponderance of probabilities was always in favor of the vessel getting off. Her position, head on the beach, was most favorable. She was perfectly upright, at high tide was lightly aground and at extreme high water she was afloat at the stern, and swinging (fol. 23, p. 185). She was able, by removal of her water ballast and coal, to lighten her draft so that she would not be aground, if at all, more than a few inches aft in the quicksand. She was undamaged, having the full use of her machinery and steam, and was in such a position that the jetties protected her from east winds. When the winds wore around from the east to the southward they would not be likely to increase to gales, because when the wind moves around with the sun, fair weather is portended (*Coveney*, p. 88).

A season of the year had been reached when *severe* weather from points between the southeast and southwest was not to be expected. Hutchings said the October winds were generally northwest and northeast (p. 97). Libelants put in a table compiled by the local forecast official of Galveston from official records (p. 146), showing that for twenty years past the prevailing direction of the wind in the month of October had been southeast, but with an average velocity of only 10 miles an hour; and that during the like period for the months of November and December, the prevailing direction of the wind was *north*, offshore, with an average hourly velocity of nine and ten miles respectively.

Unless, therefore, it was to be assumed that this November and December would be different from those of the preceding twenty years, the weather reasonably to be expected for the next two months and a half, was no menace to her safety. The wind would be off shore most of the time, and when it came on shore would come with little force.

We think it is fair, therefore, to say that the libelants' evidence tended very strongly to exaggerate the probable future danger of the vessel. Her situation was rather one of deadlock, than of danger. She was out of her element, and needed assistance to get off, but with the assistance of anchors and cables, there was no reasonable

probability that she would not get off in safety. If she had been supplied, or could have obtained additional anchors, it was the belief of the pilot (pp. 86, 90) and of the master (p. 215) that she could have got herself off. The experienced libelants, who had never failed to get a vessel off (pp. 106, 108, 111, 112) were almost certain of prompt success when they entered on the work, and attained it within four hours, after they were ready to pull.

The salvors, moreover, erred in laying so much stress on the possible future dangers of the vessel. Such dangers, unless imminent at the time of the service, afford no ground for enhancing an award.

In the *Emulous*, 1 Sumn., 207, 215, Mr. Justice Story dealt with this subject as follows:

"Salvage is a compensation for the rescue of the property from present, pressing, impending perils, not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which, under other circumstances, might have been requisite. It is allowed because the property is saved, not because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter, as an ingredient, into the case, when they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted; but they can scarcely avail for any other purpose. Ought the salvage to be dimished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the estimate of salvage, which were neither foreseen, nor acted upon, would compel the Court to deliver itself over to conjectures, resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off soundings; to desert the facts; and to be guided by speculations, always questionable, and sometimes deceptive."

(**3**.) *The value of the property saved.*

The libelants introduced no expert evidence on this subject. They rely upon the master's statement, on cross-examination, that it was "about £22,000 (p. 213). He

was not shown to have the slightest knowledge of tonnage values. This was his first command. He was only 28 years old, and had been master only *one month* before the stranding (pp. 193, 194). He did not assume to give any reliable information on the subject. All he said was: "that is as near as I can get at it. *It might be less*, as they diminish in value all the time" (p. 213).

The best and only expert evidence as to the ship's value was furnished by Mr. Bell, one of the owners, an exceptionally qualified witness. He had managed more than twenty steamers in the preceding twenty-five years, and at the time of his examination was the largest owner of shares in the eleven steamers operated by his firm of Pyman, Bell & Co. He had been an owner in about thirty steamers under the management of other firms; had been for many years a director of several steamship mutual associations in West Hartlepool, Whitby and London, and had negotiated the purchase and sale of steamers for many years. He states that a liberal estimate of her value, *after having been taken to Newport News and repaired*, would be £14,000 (p. 148). The amount for which she was insured at the time of stranding was £18,000, but this was reduced before his examination to £16,000. Those amounts were book values only, and had regard to the fact that the steamship was bought at a time when tonnage was 15 per cent. dearer than it was at the time of the salvage service (p. 148). As this evidence was taken long before the trial, and the libelants made no attempt to contradict it, the value of the vessel should be taken, for the purposes of the suit, at $70,000. This was the finding in the Court of Appeals (pp. 269-270).

(4.) *The degree of danger to human life.*

There is no intimation in the libelants' testimony that there was any danger to their lives in the performance of the service. It was testified for the claimants and not denied that there was no such danger (p. 226). The weather was fine when the salvors came, and the sea was smooth, and both continued the same during the two days the salvors were at work (pp. 228, 233, 235; Official Record, p. 253).

(**5**.) *The salvors' skill and conduct.*

The circumstances were not such as to call for the display of high skill, or the exhibition of intrepidity or heroism on the part of the salvors. Their plant was brought from Galveston to Velasco upon a small schooner in tow of a tugboat (p. 36). We know by the weather record (p. 253) that the weather was fine during the passage. At Velasco anchors were transferred to Brock's barge, and from the barge were planted off the steamer's starboard quarter (p. 233). The steamer's anchors were then taken from the bow onto the barge and planted off the other quarter (p. 39). The fifth anchor was placed on the starboard side (p. 235). Rope cables were attached to the chain cables and carried aboard the steamer, each cable being put around the drum of two winches. The *Elfrida's* engines and steam working, the propeller astern, and straining with her four winches, and the windlass on the cables for four hours, hauled her over the sands to deep water (pp. 40, 41, 226, 228, 232, 233).

The salvors' tug never put a line to her until she was afloat (p. 213).

(**6**.) *The value of the property employed in the salvage service.*

(**a**.) The appellant's claim that more vessels are risked than the evidence shows were employed in the service. It is said two tugs, two schooners and two barges were engaged about the work (Brief, p. 37). But the evidence shows that only one tug and one barge were used in laying the anchors, connecting the cables to the steamer, and attending her, until she put out to sea.

Scott, chief officer (p. 226), testified;

"Q. What kind of an expedition did the salvors have? What did it consist of? A. They brought three anchors, and hawsers, &c., and small boats.

Q. How many tugboats and lighters? A. One tugboat and one lighter at at a time."

Clarke, libelant, also testified that only one tug, and only one schooner was in use (p. 44), and intimates that

but one lighter was engaged, saying "I was on *the lighter* till the anchors was laid" (p. 39).

The fact that he may have had other vessels at command in the harbor cannot be considered, any more than his floating property in other harbors.

(**b**.) The value of the tug in use was not referred to by Clarke, though he was twice on the stand. It seems that he undertook a responsibility of $6,500 in respect of the lighter (p. 38). Nothing was said about the value of the anchors or cables. The value of these properties was peculiarly within the knowledge of the libelants. The fact that they failed to state it should not incline the Court to estimate it at a very high figure. It seems probable that $20,000 would be a liberal estimate of all the property risked by the salvors in the adventure.

(**7**.) *The danger to which the salvors' property was exposed.*

The salvors did not themselves testify to any danger to their property in the condition of wind and sea which actually prevailed. With a wind blowing at the rate of three miles an hour (p. 253), it is obvious there could not have been any sea running. Clarke, himself, said not a word on the subject. This point need not, therefore, be discussed.

(**8**.) *The time and labor expended in the performance of the salvage service.*

Clarke received notice from Moller and Sorley, on the 14th, that his bid was accepted (p. 34). On the same day he went with his tug and schooner and outfit from Galveston to Velasco (p. 35), where on the afternoon of the 15th the contract was signed. On the 16th and 17th until about three o'clock (p. 233) the salvors were engaged in laying the anchors and connecting the tackle with the vessel. They began to haul at about three or half-past three (p. 233), and at half-past seven the ship was free of the ground and proceeded to sea (Mate's log, p. 247; Engineer's log, p. 250). The whole of the time oc-

cupied in hauling her off the beach after they began to pull was about four hours (pp. 226, 230, 233, 236).

From the time Clarke heard his bid was accepted (p. 34) until the ship was afloat was exactly four days.

(**9**.) *Responsibilities incurred in the performance of the salvage service, such as, e. g., risk to the insurance, &c.*

No evidence was produced by the libelants on this subject.

(**10**.) *Loss or expense incurred in the performance of the salvage service.*

There was no evidence of any items under this head.

This analysis of the service, considering its elements separately and apart, shows that it was not such as would ordinarily induce a court of admiralty to give a liberal award.

In its essential features, the case is strikingly like that of The *Hesper*, 18 Fed. Rep., 696, where the Circuit Court reversed the decree of the District Court for the Eastern District of Texas (18 Fed. Rep., 692), and reduced the salvage from $8,000 to $4,200. A comparison of the two cases shows the following results:

1. The *Hesper* stranded December 12, 1882, on Galveston Island.	1. *Efrida* Standard October 5th, near Velasco.
2. Her value was £22,000.	2. Her value about £14,000.
3. Her net tonnage, 1,069 tons.	3. Net tonnage, 1,454.
4. Supplied with winches and windlasses.	4. Ditto.
5. Had a cargo of 900 tons of salt	5. No cargo.
6. Went ashore at a speed of about 4 knots an hour.	6. Drifted ashore.
7. Struck easily, without shock, and remained upright.	7. Ditto.
8. Her draught, 13 feet 9 inches.	8. Draught 11′ 10″and 9′.
9. Sea smooth; very little wind from the south.	9. Sea moderate; wind S. E.
10. Ship headed Northeast by North.	10. Headed about N. W.

11. Efforts made with Kedge anchor and engines to heave her off.	11. Ditto.
12. Assistance called for from Galveston.	12. Ditto.
13. December 12 P. M., small tug *Estelle* sent to her assistance.	13. Oct. 6th and 7th, Brock's tug assisting.
14. Ineffectual efforts made by tug *Estelle* for two hours to float the ship.	14. Efforts of Brock's tug ineffectual.
15. Sea subsequently became turbulent.	15. Ditto one day.
16. *Estelle* left the *Hesper* the same night.	16. *Elfrida* awaiting assistance 4 or 5 days.
17. December 13, the *Hesper* shifted her position slightly; pumped up her ballast tanks; threw cargo overboard.	17. *Elfrida* remained in same position, with ballast in.
18. December 13, tug *Buckthorn* and a steam lighter took a heavy anchor and cables and two hawsers to the steamer.	18. Oct. 16th, *Josephine* and barge planting anchors.
19. On the 14th tug *Buckthorn* planted the anchor at sea in 18 feet of water, and carried her cables 210 fathoms to the *Hesper's* steam winch.	19. Oct. 17th, ditto until 3 P. M., and bringing cables to winches.
20. Same day men engaged throwing over cargo.	20. Pumped out ballast.
21. *Hesper's* hove on hawsers and used her engines, *Buckthorn* assisting with line, with no effect.	21. Same day *Elfrida* hove on hawsers and used propeller. Came off in 4 hours.
22. December 14, tug *Estelle* arrived alongside; another lighter came alongside; taking off cargo.	22. ——
23. Same day, when a third of the cargo had been removed, and the water ballast pumped out, the steamer was got off by the use of her own engines, and her steam winch pulling on the one anchor, *Estelle* and *Buckthorn* assisting by pulling on line.	23. ——

24. Time employed in the service, three days.	24. Two days.
25. Value of salvors' property employed, about $35,000.	25. Say $20,000 (big estimate).
26. Place where *Hesper* was stranded, slope of ground seaward was gradual, bottom sandy.	26. Ditto.
27. During the time the *Hesper* was aground, there was no wind or sea of any danger to ships, and the services rendered to the *Hesper*, aiding her to get off, were not attended with any hazard or danger.	27. Ditto.
28. The value of the *Hesper*, which was entirely uninjured, was $100,000, and her cargo, $6,500.	28. Value of *Elfrida*, say $70,000. No cargo.
29. The *Hesper* had no protection against wind or sea, from any direction.	29. *Elfrida* had protection of jetties against all winds from N. E. to S. E.
30. The amount of the award in the *Hesper's* case, $4,200.	30. Award against *Elfrida*, $10,000.

The only material point upon which no comparison between the cases is made relates to the depth to which the vessels rested in the sand. From the comparatively greater ease with which *Elfrida* came off, it is a fair inference that she was at least not harder aground.

By analogy to the *Hesper* case, it would appear that an award of $5,000 might reasonably have been expected for service to the *Elfrida* if the amount had been left wholly to the Court.

We have not been able to find any other reported cases bearing close resemblance to the present. It may be instructive, however, to notice a few where the peril was much greater and more imminent, the service much larger and more arduous, the values risked and saved far above those involved here, and where the Courts have, nevertheless, awarded relatively not more than one-third of the amount here claimed.

In *Pent* v. *The Ocean Belle*, 19 *Fed. Cases*, 200, a ship with cotton, stranded 30 miles from Key West, was

hauled off in good weather by eight wrecking vessels, with 64 men, and a steam propeller with 21 men, after lightening her of 1,140 bales of cotton. She was then towed around an extensive shoal, about 70 miles, to the harbor of Key West. Marvin, *J.*, awarded $13,000 upon an aggregate value of $165,000, it appearing that had the weather been bad, the ship would have been in great peril of total loss.

In the *Diadem*, 7 Fed. Cases, 632, a ship and cargo, of the estimated value of $125,000, on a voyage from New York to New Orleans, got ashore on Long Key. She was in imminent peril of total loss, but was saved by the libelants with their vessels, which carried 68 men, and 28 men in small boats. For this service Marvin, *J.*, decided that $12,000 would be reasonable salvage; but that in consequence of negligence and errors of judgment of the salvors and delay in getting the vessel off the reef, this amount should be diminished one-half.

In the *North Erin* (71 Fed. Rep., 430, deficiently reported), a large steamship with a cargo consisting chiefly of green fruit, ran ashore on the outer end of Long Island, at the top of high water, and at a speed of 7 knots in fog. She was immediately swung around, by the sea, until she lay broadside on a quicksand beach, in which she settled about one and a half feet. She was unable to move by her own power or anchors, and, in case of a rising sea, would have been in a critical position. A powerful wrecking tug, of large value, with the owner aboard, came 80 miles to her assistance, and at the next high water, after pulling about three hours, having the assistance of the steamer's engine and sails, dragged her off into deep water. The tug was engaged going and coming for two days, and supplied hawsers and appliances. The green fruit would have been greatly damaged by any considerable delay. Neither ship nor cargo suffered any damage. The salved values were about $100,000. The Court, upon the special facts, awarded $10,000.

The *Lamington*, 86 Fed., 675, to which appellants refer (Brief, p. 62), is not at all analagous. The service there

extended over twenty-two days, was attended with great risk, both to life and to property, and was performed with high skill under most adverse circumstances, yet the award was only $8,600, though the salvor's cash outlay had been $5,000.

In the *Guadalupe*, 20 Fed., 433, the District Court for the Eastern District of Texas awarded $8,000 to five tugs for floating a steamer, valued, with her cargo, at $645,000, which had run ashore at high speed in fog near Galveston.

By this comparison of other cases it appears that the libelants have recovered twice as much as any admiralty court presumably would have allowed them. They want four times as much. So great an excess in their agreement, we submit, is unreasonable and inequitable towards the property charged with its payment, and fairly justifies an admiralty court, as a court of the purest equity, in setting the contract aside.

III.

If satisfied that no important error of law was committed by the Court of Appeals, this Court will not enlarge the award of $10,000 unless satisfied that the amount was glaringly inadequate.

In the *Sibyl*, 4 Wheat., 98, where the Circuit Court had diminished, by fifty per cent., the award of the District Court, Chief Justice Marshall, on appeal to this Court, said:

"In such cases it is always impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed and the mode of distribution. * * * Appeals should not be encouraged upon the ground of minute distinctions, nor would this Court choose to reverse the decision of a Circuit Court in this class of cases unless it manifestly appeared that some important error had been committed."

The same question was again before the Court in the *Connemara*, 108 U. S., 352, 359, where Mr. Justice Gray said:

"By the uniform course of decision in this Court, during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the Judiciary Committee of the Privy Council of England, exercising a like jurisdiction, the amount decreed before was never reduced unless for some violation of just principles, or for clear or palpable mistake, or gross over allowance (Hobart *v.* Drogan, 10 Pet., 108, 119; the *Commanche*, 8 Wall., 448, 479; the *Neptune*, 12 Moore P. C., 346; the *Carrier Dove*, 2 Moore P. C. (N. S.), 243; Sc. Brown & Lush., 113; the *Fusilier*, 3 Moore P. C. (N. S.), 51; Sc. Brown & Lush., 321)."

To the same effect also are the cases of the *Tornado*, 109 U. S., 10; the *Hesper*, 122 U. S., 256, 266; and the *Excelsior*, 123 U. S., 40, 51.

IV.

The agreement was inequitable, even if judged solely by the position of the parties, and of the property, at the time it was signed.

(**1**.) The parties did not stand on an equal footing in making the contract (*Post*, Point V.).

(**2**.) The situation of the property and the apparent difficulties of the service were not such as to justify an agreement for such a large amount.

It has been shown that, with her ballast pumped out, the ship was in the sand at her stern only six inches. She was upright, moving with the agitation of the waters, was undamaged, and, being right angles to the beach, was in a most favorable position to be hauled off. The weather was fine, and there was no immediate prospect

of change. Both the pilot and the captain were of opinion that if they could have obtained the necessary anchors, the ship could have been removed without the assistance of salvors (*Coveny*, p. 86; *Burgess*, p. 215).

Mr. Bell, one of the owners, testified most positively that if he had known the real position of the ship as he subsequently understood it was [his assumptions, as stated in his testimony, accord exactly with the facts as proved], he would not have authorized the acceptance of such a large tender (Answers to 9th, 11th and 13th Interrogatories, pp. 150, 151, 152).

No witness in the case assumed to testify that the contract was reasonable in any view. The burden to show this rested on the libelants (*cases ante*, p. 40).

The circumstances show that the agreement was made by the captain improvidently with little consideration of the elements which constitute a meritorious salvage service, and that the salvors demanded an excessive sum in proportion to the expenses and obligations which they assumed. The captain had no previous experience of such a situation, and the circumstances do not indicate that he had formed any reasonable judgment as to the peril of the ship, or the difficulties that would attend her removal. The case is not one where the work was more easily accomplished than could reasonably be expected, through accidental or favorable circumstances. It was done under the exact conditions reasonably to be apprehended when the agreement was effected. The Tide Record (p. 120) clearly shows that there was no unusual tide. All the circumstances were exactly what Clarke must have understood they would be.

The fact that the libelants agreed to limit their time to twenty-one days is not of material importance. They did not engage under the agreement to work for twenty-one days (pp. 15–16). If they had failed to get her off on the 17th of October, there was nothing in the agreement to prevent them from picking up the anchors and abandoning the work at a time when the expenses would have been very slight in proportion to the chances of success. Another reason for saying that this limit was unimportant is that there was nobody else to take up the work. If,

for any reason, a longer time had been required for the service, there is every probability that it would have been granted.

The contract did not bind the salvors to any heavy expense. The usual mode of assisting a vessel in the *Elfrida's* position is by means of anchors planted in deep water. When that work was once done the salvor's expenses would be substantially at an end. The agreement provided that they were to have the use of the ship's crew and of her engine in their work; and it was held in the District Court that the use of the "engine" included use of the four steam winches, which are hoisting engines, placed on deck, and of the steam windlass. After the preliminary work of putting down the anchors was performed the only other work, apparently, that could be done would be for the ship to heave on the winches and windlass with her own steam, which was to be furnished at her own expense. Moderately rough weather would be better for this purpose than fine weather, as it would raise the ship from her bed at the stern; and keeping a high tension on manila ropes under such circumstance causes a vessel to go astern with each rise.

In view of the vessel's position and of slight risks and obligations undertaken by the libelants, as compared with those they got the captain to assume for the vessel—in effect to heave herself off, with the aid of some of their anchors—the amount promised to be paid was unreasonable, looking at the matter even as of the date of the contract. Regarding it in the light of the event, as the Court of Appeals was right in doing, there is hardly room, as we submit, for an argument to the contrary.

V.

The Court properly held that the parties did not stand on an equal footing in negotiating the salvage agreement.

(**a.**) Clarke was the only salvor in Texas, with the necessary anchors and appliances for doing the work, whom the captain could employ.

Moller, a witness for the libelants, who had been a ship broker in Galveston for twenty-two years, testified there were but two sets of salvors in Galveston who could have performed the service, the Galveston Steamship and Lighterage Company, and Charles Clarke & Company. Moller's firm were charterers of the *Elfrida* at the time of her stranding (p. 128). Immediately on hearing the ship was ashore, Moller went to the manager of the Galveston Steamship and Lighterage Company, of which he was a stockholder, and asked the manager if he would send tugs and appliances to Velasco to assist the ship off. The company declined to undertake the work (p. 129), the reason apparently being that they had no heavy anchors (p. 111).

Moller further says:

"Then the only other appliances I knew of in this town was Charley Clarke & Co., who at various times have been engaged in the same business. In fact, I have personally taken three or four vessels off the beach with the assistance of Charles Clarke & Co. (p. 120). * * *

"Q. Was it the sum of your evidence that there was no one else to do this work except Charles Clarke? A. At Galveston; yes, sir.

Q. At Velasco? A. Outside of Clarke and Brock, I did not know of any tugboats that were able to pull a tree off the beach.

Q. Did anybody else have any plant to do it with? A. Yes, sir; north of Galveston" [alluding to the Merritt Wrecking Company of New York.]

"Q. Here? A. I am not aware of any such plant existing" * * * (p. 134).

"Q. There have been vessels sent to you before this one that have been beached? A. Yes, sir. I have taken several off myself.

Q. Apart from this lighterage company in which you were interested, I understand you to say that Mr. Clarke has the only heaving anchors fit for this work? A. The only anchors fit for a job of that kind.

Q. Anybody else got any? A. I am not prepared to say. I think there are some smaller anchors here, but I think he has probably the only heaving anchors in this port.

Q. When the captain applied for assistance, did you go to anybody else? A. There is nobody else here but the Galveston Lighterage Company.

Q. And it was Clarke or nothing? A. Yes, sir; unless we had waited for wreckers from the Northern States" (p. 138).

McDonald, another witness for libelants, a Galveston pilot, testified:

"Q. Who else besides Captain Clarke has appliances sufficient to get a steamer off? A. I do not think that anybody has except the Galveston Lighter Company. Captain Clarke has done about all that work, except when the New York Wrecking Company came to the relief of the *Australia*.

Q. Is the Galveston Lighter Company the company Mr. Moller is interested in? A. Yes, I think he has some stock in it.

Q. What kind of lighters do they use? Steam propellers? A. Yes, sir; and barges.

Q. Have they heavy anchors? A. Their own anchors are not heavy" (p. 111).

Hutchings, also a witness for the libelants, superintendent of the Life Saving Department in Texas, testified (p. 102):

"Q. Do you know who has done most of the salvage work along these waters? A. Clarke & Co.; Mr. Charles Clarke has attended to several vessels that has been stranded under my operation as an officer. * * *

Q. Hauling off with anchors is generally accepted as the safest and surest way? A. Yes, sir; the only way I know of until she is afloat, and you can get steam service. * * *

Q. Do you know anybody else here who had heavy heaving anchors? A. I do not know.

Ross, a witness for libelants, who was a stevedore at Velasco, and a foreman for Brock, the other salvor, who had been working on the vessel in the early days of her stranding, testified (p. 123):

"Q. Had Brock no anchors suitable for the purpose in Velasco? A. No, sir.
Q. Had he anywhere? A. No, sir.
Q. Did anybody else have any except Clarke? A. Not to my knowledge."

(**b.**) Clarke was a man of far greater experience, and had a better knowledge of the coast, the difficulties to be encountered, the chances of immediate success in the undertaking, and of the weather reasonably to be expected, than the captain.

Clarke's age is not stated, but as his son Charles Clarke, Jr., was a member of his firm and a co-libelant (p. 35); he was obviously a man of mature years. The libelants' witness McDonald says that Clarke was a capable and experienced man in salvage matters; "as far as I know, he has had more experience than any man in Galveston." He had done all the salvage work on steamers stranded along the coast, except in one case (p. 111). It was mentioned especially that he had removed the *Hesper* from the beach by anchors, a vessel whose situation was much more grave than that of the *Elfrida* (p. 112, and the *Hesper*, 18 Fed., 692; on appeal do., 696). It is known that he was also engaged in the *R D. Bibber* (33 Fed., 55, 56). Moller, who had known him for many years, testified that Clarke had taken several vessels off the beach for him (pp. 129, 138). Hutchings, of the Lighthouse Department, said Clarke had done most of the salvage work along the coast. and had attended to the salvage of several vessels under his operation as an officer. So far as appears, he had never failed to float an iron vessel on which he was engaged along the coast. His experience must, of course, have familiarized him with the difficulties likely to be encountered, and have enabled him to form a judgment as to the weather reasonably to be expected, and the promptitude with which he could

accomplish the work. His knowledge of the prevailing direction and force of the winds in that season enabled him to judge of the probability of sand accumulating about the vessel.

The witnesses who referred to the banking of sand stated that it was caused by currents, dependent on the wind (McDonald, pp. 108, 109; Coveney, p. 88; Hutchings, p. 98). Scrimgeour (p. 92) says that sand will bank up around a vessel only on the side where there is an eddy, and that a change of current will cause it to disappear. "These sands move with the current. It is fine, movable sand. The water is thick with it" (p. 92). To the same effect, Hutchings (p. 102). Coveney's evidence that the only banking around the *Elfrida* was under the bluff of the bow (p. 87) tends to confirm Hutchings' evidence.

The record of the weather for twenty years shows that the prevailing direction of the wind for October is south-east, with an average velocity of ten knots an hour (p. 146). The vessel was lying with her stern to the south-east and head to the north-west (Coveney, p. 88); so that the only tendency of that wind would be for the sand to bank, as it did, in front of her, or nearer the shore. Coveney was cross-examined on the exact point:

"Q. If the wind had changed to the south-east, would there have been danger of the sand banking? A. Probably not from the south-east, because it was right in line with the ship" (p. 88).

And it seems evident that an expected wind velocity of ten knots an hour would not create any such current as would be liable to cause any serious banking of sand. Indeed, this is in a measure proved by the fact that it banked very slightly, if at all (p. 210) during the twelve days that the ship was ashore.

The master was without knowledge, or the means of knowledge, of any of these important matters. Though he had been to sea for a good many years, this was his first experience with a stranded vessel (p. 195). He was but twenty-eight years of age (p. 194). The *Elfrida* was his

first command, and he had been captain of her only one month when she went ashore (pp. 193, 194). It was also his first visit to Velasco (p. 195). He, of course, had the means of knowing, and did know, that the sand had not actually banked around the ship (p. 210); but what was likely to happen in the future he did not know. Clarke himself represented strongly to the master that sand was likely to bank around his ship, and it was this which chiefly influenced him in closing the agreement (Cables, Exhibits D and E, p. 218; Burgess, p. 206, 243).

On the 9th he had cabled his owners the amount of the two tenders received, one from Brock for $24,000, and one from Clarke for $22,000 (p. 205), recommending acceptance of the lowest (p. 218). To this the owners replied, October 10th.

"Don't act without our instructions. Lloyd's underwriters communicating direct, as consider tender excessive. Try get condition in tender giving us right abandon vessel to salvors in lieu of salvage charges (Ex. 27, p. 185).

This was evidently communicated to Clarke, who was still in Velasco (p. 34); for on the following day, the 11th, the conditions of weather and sea remaining unchanged, the master sent two further cables to Newcastle, based, as he says, on Clarke's representations (p. 205). The first cable was Exhibit D:

"Delay will cause danger of sand banking, also increased cost of floating."

Later on the same day he dispatched Exhibit E:

"Fresh breeze blowing. Vessel laying easy, making no water. Afraid of sand banking up" (p. 318).

In explanation of these cables, the master said (p. 205):

"Well, I sent this cable, Exhibit D, when Mr. Clarke said that if I did not receive word soon he would want more for floating the ship, as there was a bank forming around her, and I cabled my owners to that effect."

Exhibit E was sent upon similar representations (p. 205).

So far as the present was concerned, the master knew the sand was not banking up around her.

"Q. Did you examine to see whether it was forming while she was lying there? A. Yes, sir.
Q. What did you discover? A. I found the sand was not making any at all, or very little (p. 210).
Q. Now, captain, what was the actual fact as to this banking of sand around the steamer at the time she was floated? A. It was hardly perceptible" (p. 206).

But as to the *future* danger of the banking of sand, the element on which the libelants most relied, the master was without the means of knowledge. On that subject he testified:

"Q. Were you fully advised as to the seriousness or ease which the vessel could be got off the place where she was then stranded? A. No * * * I have not had any experience along the Gulf coast; there are few coasts where there is such an extent of beach as here (p. 199). * * *
Q. Captain, I understood that you had just as good means of knowing whether the sand would form around the vessel as anybody else had? A. I am not a native down there. I do not know what it would do in a breeze of wind. Sometimes it will shift in a breeze of wind, and sometimes it will not.
Q. You had the same means to find out whether the sand had actually formed or not? A. Yes, sir; but it did not form" (p. 12).

Such knowledge as he had of the coast, derived from having "driven all along it in a cart," quoted in appellants' brief, p. 23), was derived *after the ship was floated* (p. 224).

(**c**.) The master was practically compelled to accept the contract by Clarke's refusal to take less, and his threat to ask more if the contract was not promply made.

It is true that when Captain Clarke first came to the ship (October 8th) he offered to do the work for what the United States courts would allow (p. 209). This offer was never communicated to the owners, and they were ignor-

ant of it until after the service was completed (Bell, p. 154). The captain's reason for refusing it, he says, was "simply because I thought that if he got the work he might extend the work. I have known of that being done" (p. 216). The master was gravely at fault for not cabling this over to the owners, as they would have accepted it (p. 150). This circumstance, however, should not prejudice the case against the owners' property (The *Tennasserim*, 47 Fed , 119, 120). It is actually immaterial, however, because a week later, and before signing the contract, Clarke refused to do the work at all except for $22,000. The offer to do it on a basis of a salvage compensation seems never to have been referred to after the first interview. The master's testimony as to his final conversations with Clarke before signing the contract is as follows:

"Q. You signed that contract after receiving the cable from the owners? A. I asked Mr. Clarke first whether he would take any less. He and I had several conversations on that; but he said he could not accept any less. The vessel was in danger of forming a bank of sand around her; and being advised likewise by Moller's agents that if the vessel stayed there much longer she was likely to form a bank, and the likelihood of not getting her off would be increased, I then signed the agreement with Captain Clarke after that transpired" (p. 243).

"Q. What conversations did you have with Clarke & Co., or any one representing them, about the price of the work that they were then proposing to do to float the vessel? A. I asked them if they would accept less.

Q. What did they say? A. *They told me that if the agreement was not settled they would have to give it up—if we did not come to terms they would have to give it up.*

Q. What terms? A. This $22,000.

Q. Did he give you any reason, or state why he had to give it up? A. He said that a bank might form around the ship, and it would cost more to float her; the risk would be greater.

Q. Who told you this? A. Mr. Clarke.

Q. Did you endeavor to solicit other people after receiving this cablegram that I quoted above? A. I saw Mr. Brock. That was the other party that tendered.

Q. What did he say about doing the work for a lesser price than $22,000? A. He would not do it.

Q. What did he say? A. He said he could not do it for less" (p. 205).

When it is considered that Clarke and Brock were the only salvors who, either alone or in combination, could do the work, as appears from the libelants' own evidence (*ante*, pp. 65-67), and that they not only declined to do it for less than $22,000, but practically threatened to charge more if the terms were not agreed to at once, it must have appeared to the master that he had no reasonable alternative but to accept. He was, therefore, as we submit, under that degree of compulsion which the courts have said releases him and the property from the binding force of his agreement (The *Don Carlos*, 47 Fed., 746, 748; the *Mark Lane*, 15 P. D., 135; the *Rialto*, 1891, Probate, 175; the *Shiedam*, 47 Fed., 923; the *Jenny Lind*, Newb., 443, 447-8; the *Tennasserim*, 47 Fed., 119; the *Sirus*, 15 U. S. App., 191).

(**d**.) The cable from the owners on October 12, instructing the captain to accept Clarke's tender of £4,580, "if lower were impossible" (Ex. D, p. 251), should not affect the case.

When that cable was sent, on October 12, at 3 P. M., the only information the owners had received of the stranding was contained in the captain's cables, dated the 7th, 8th, 10th, 11th and 12th of October (Bell, pp. 148, 149; and Exhibits Nos. 1, 2, 3, 4 and 5, pp. 157, 158; Burgess, Exhibits A, B, C, D and E, pp. 217, 218), and one telegram from Moller & Co., dated October 8 Bell, p. 150, Ex. 24, p. 163).

The captain's cables were as follows:

Exhibit A, dated October 7th (p. 217)—(translation):

"The ship grounded at the entrance of the harbor Friday. She is fast head and stern. *The ship is in a critical position.* Have sent for assistance. The ship was in charge of a Government pilot."

Exhibit B, dated October 8th (p. 217):

"Vessel same position. Lloyd's agent not arrived."

Exhibit C, dated October 9th (p. 218):

"Lloyds agent here. Have advertised for tenders to get the ship afloat on the principle of no cure, no pay. Put ship in Galveston, including diver. Lowest bid forty-five hundred and eighty pounds. Lloyd's and myself recommend acceptance. Vessel easy. Bottom sand one thousand feet from deep water."

Exhibit D, dated October 11th (p. 218):

"Delay will cause danger of sand banking, also increased cost of floating."

The master's letter, dated October 7th (Exhibit 25, p. 163), which the appellants intimate had been received by the owners before the ship was floated, actually did not reach them until October 20th (p. 151). Prior to the receipt of this letter they had understood from the master's cables that the vessel was in a critical position, as he said, and that the salvage work would accordingly be a heavy job (p. 151). This was shown by their instruction to the captain in the cable of October 12th to include a provision in the agreement that if the steamer, after coming off, was not worth the amount of the salvage she should be taken in payment.

On receiving this letter of the 7th it seemed materially to qualify the impression produced by his cables (Bell, p. 151). The owners had not been informed of the offer of the salvors to perform the service for what a court of admiralty would allow. If they had known of this, they would have accepted such mode of settlement (Bell, p. 150). They did not know that the steamer was lying head on to the beach, nor her draft, nor the depth of water in which she was lying, nor how much greater her draft would have been with her ballast out than the depth of the water in which she was lying, nor did they know to what extent sand was forming about her, or had formed about her, except as the captain cabled he feared that danger. If they had known the facts in regard to those matters they would not have authorized acceptance of the tender (Bell, p. 150). On receipt of the captain's letter, dated October 15th, saying, "To accept less was

impossible, salvors maintaining that vessel was every day getting into a more critical position on account of bank forming around her," and that "Lloyds agent at Galveston being a very old and feeble man, was not able to be present at the signing of the contract" (Exhibit 26th, p. 164). The owners felt "that the salvors or other interested persons had been taking advantage of the isolated position of Captain Burgess" (Bell, p. 151), and disaffirmed the contract.

Mr. Bell testified in the 11th interrogatory:

"If you had been informed that the vessel was lying easy on a sand bottom head on the beach, with hardly any perceptible accumulation of sand around her, in water not less than a foot shallower at one end of her than her draft would have been with her water ballast tanks empty, and that the weather was fine, with no immediate prospect of change, what would your judgment have been in regard to accepting the said tender of £4,580 made by the libelants for getting the steamer off? A. If I had known those facts I certainly would not have authorized the agreement for such a large sum" (p. 151–2).

In answer to the 13th interrogatory he further testified:

"I understand * * * that it has been proved, or will be proved, that the vessel was lying on a sand bottom head on the beach, with hardly any accumulation of sand around her, and that the weather was fine, with no immediate prospect of change, and the water where she lay was seven feet forward and nine feet aft, while her draft with the ballast pumped out would have been nine feet forward and n ne and a half feet aft. If this information be anything like the actual facts, it appears to me that the master had been willfully misled by the salvors or other interested persons; and that acting under false impressions conveyed to him as to the situation of the vessel and prospects of salving her, he unwittingly cabled me an erroneous view of the position. I have no hesitation in saying that had the maters referred to in the 9th and 11th interrogatories been known to me, I would certainly not have authorized acceptance of the tender" (p. 152).

It is to be observed, moreover, that the captain failed to carry out his instruction to accept £4,580 only "if lower impossible;" for on the same day, without waiting to see

Clarke, or making any other effort, so far as appears, to obtain lower figures, he telegraphed Sorley, Lloyd's agent: "Have received cable accept tender forty-five eighty" (Ex. 70, p. 171); and informed Morrisy of the terms of the cable, so that the latter telegraphed Moller on that day, "Pyman cables accept Clarke's bid. Tell him better get here quickly" (Exhibit 63, p. 190). Clarke learned of these telegrams from Sorley or Moller, or both (p. 35); and, knowing the limit of the captain's authority, peremptorily declined to accept less.

The captain had no other advice which should materially affect the case.

Mr. Sorley, Lloyds agent, was unable, by reason of age and infirm health, to give the master any material assistance. He was very ill and infirm at this time (pp. 63, 110, 111, 112), was only able to go to the ship once, and was not present when the contract was concluded (see Exhibit 26, p. 164). The captain had no agent. Moller & Co., who have been referred to as his agents, were really the charterers of the ship (Moller, p. 128; Burgess, 198), and Morrisy, who has been referred to as the ship's agent at Velasco, was Moller's agent (Moller, p. 128). No doubt the captain talked with pilots at Velasco and others; but an examination of the record will leave little doubt that the principal object of most, if not all, of them was to help their friend Clarke make money out of the ship.

(**e**.) The circumstances indicate a combination to secure the work for Clarke, and collusion between Brock and Clarke in the bidding, as well as some agreement for division of the salvage.

It has been shown (*ante*, p. 65) that Clarke and Brock were the only available salvors, and that Clarke had the necessary anchors but no barge to plant them with, while Brock had a barge but no anchors. It was represented to the captain, and appears to have been the fact, that Clarke and Brock were the only salvors who could do the work; and he was advised against applying elsewhere for assistance (p. 213). Brock was the first to reach the ship after her stranding, and did some work before Clarke reached her. As soon as the charterers, Moller & Co., were ad-

vised of the stranding, they cast their influence with the master in favor of Clarke, telegraphing their Velasco agent, Morrisy, on October 7th, as follows:

"Clarke's tug, with hawser, gone Elfrida's assistance. Recommend Charles Clarke solely attend matter, he being very practical wrecker" (Exhibit 10, p. 183).

Morrisy told Captain Burgess of this recommendation (pp. 59, 60), and telegraphed back to Moller on the same day, "Think Elfrida will accept Clarke" (Exhibit 15, p. 184). Clarke went to Velasco October 7th (p. 44), and at once began negotiations with the captain (pp. 32, 33). This brought the following telegrams from Brock:

To Moller:

"I have been on ground and rendered assistance to Elfrida, running anchors, &c. Why shut me out altogether? Am able to furnish plant" (Ex. 18, p. 184).

Also a telegram to Beers & Co., of Galveston:

"If you are Lloyds' agents why not let me work on Elfrida as well as any other person? I was on ground and ran anchors out before Seminole (Clarke's tug) came" (Exhibit 19, p. 184).

Also this telegram to James Sorley, Lloyds' agent at Galveston:

"I have already rendered assistance to steamship Elfrida. Before you close with others give me a chance" (Exhibit 20, p. 184).

Brock's efforts to head off Clarke's negotiations were stopped by the following telegram from Moller to Morrissy, October 8th:

"Inform Brock privately as master of Elfrida called for assistance we could not help sending Clarke, who had only tug boat available. We have no objection to Brock continuing assisting Elfrida *making his own bargain* so long as White Jacket attended to" (Ex. 8, p. 183).

Brock also told Morrisy "that he did not want to be shut out" (p. 61). But after Morrisy showed him Moller's telegram just quoted (p. 61) Brock made no further efforts

of any kind to be employed in the salvage service in competition with Clarke.

When the captain applied for tenders he received only two bids, one from Clarke and one from Brock (p. 242). Clarke's bid was $22,000 and Brock's $24,000. Subsequently, when Clarke's figures were made known to Brock he declined to bid under them (p. 205). Brock died before the case came on for trial.

When the work came to be done it was found that the anchors were planted from Brock's barge, which Clarke claims he hired.

"Q. When did you hire the lighter from Brock? A. It was the day I arrived there, the 14th, I think, *before the contract was signed*" (p. 37).

Clarke admits that he had eight of Brock's men as well as Brock's lighter (p. 38); and that he engaged Brock to assist in the work, telling him he would pay him for assistance, but without agreeing upon any terms except for the hire of the lighter (p. 38). During the service Brock was on the Elfrida, and Clarke on the tug (p. 226). It was Brock who ordered the ballast discharged before the winches were started to haul the ship off (pp. 212, 213). After the vessel was afloat Brock telegraphed to Clarke, who had returned to Galveston, "Captain goes to Galveston to-morrow. Get papers and see ship." Clarke accounts for that interest by saying "I owed him for helping me on the ship. He certainly did not work for nothing" (p. 144). And on October 25th, Brock informed Clarke, "Ship seized" (p. 189).

Moller took the stand and denied any collusion with Clarke. The following facts, however, appeared. They show at least that the relations were those of extreme friendship.

Moller agreed, in order to give Clarke an opportunity to libel the ship, to detain her at Velasco after she was afloat, and telegraphed his agent Morrisy to that effect (p. 137). When Clarke was ready to go he telegraphed Moller to have Mr. Wilson, who was Moller's father in law (p. 137) "get papers ready, seize *Elfrida*" (Exhibit 51, p. 188). Subsequently, during the examination of wit-

nesses before the Clerk, Clarke interrupted the proceedings and declared that he had never employed Wilson to represent him; but the Clerk stated that Mr. Wilson had been employed by Moller, and the examination then proceeded (pp. 240, 241 and 28). It is also to be observed that Moller was one of the sureties on the libelant's stipulation for costs (p. 4).

Though these circumstances may fall short of absolute proof of collusion, they at least afford evidence of a combination of those in touch with the captain to secure the work for Clarke, and to leave matters in such shape that he could impose his own terms. They are significant enough, taken in connection with the other facts of the case, to justify the conclusion of the Court of Appeals that in negotiating the contract the master and Clarke were not on the same footing.

VI.

The decision of the Court of Appeals should be affirmed, with costs.

NEW YORK, November 9, 1898.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for *Elfrida*.

J. PARKER KIRLIN,
Advocate.